

A critical evaluation of South Africa's enactment of new anti-trafficking legislation in fulfilment of its international obligations to prevent, suppress and combat the trafficking of persons under the Palermo Protocol

by

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Abstract

The United Nations Convention against Transnational Organised Crime (“Palermo Convention”) and the Protocols thereto aim to prevent and combat the international phenomena collectively known as organised crime. Specifically, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children obliges South Africa, as United Nations (“UN”) member that has ratified the Palermo Convention and a number of other international treaties, to promulgate legislation explicitly dealing with the prevention and combating of trafficking in persons. Consequently, the Prevention and Combating of Trafficking in Persons Act 7 of 2013 (“the Trafficking Act”) was promulgated by the national legislature on 29 July 2013 and has come into operation on 9 August 2015. The Trafficking Act creates the statutory crime of trafficking in persons along with different other punishable acts in order to combat trafficking in persons. This definition is compared to that the prescribed conduct which South Africa is internationally obliged to criminalise. Prior to the enactment of the Trafficking Act, South Africa lacked specific legislation criminalising crimes of trafficking in persons. However, South Africa utilised the existing common and statutory law offences, which included certain interim trafficking measures in prosecution of human trafficking. This study compares the South African legal framework, consisting of both the Trafficking Act position and the pre-existing legal resources, with the international obligations in terms of the Convention and Palermo Protocol in order to ascertain whether South Africa meets the three international obligations of, firstly, the criminalisation of certain prescribed conduct, secondly, victim protection and assistance and, thirdly, the prevention and combat of trafficking in persons. This study focuses on analysing the compliance of South Africa’s trafficking definition with the international offence. The *mens rea* required internationally is discussed and compared to the *mens rea* required by the Trafficking Act. This study draws the conclusion that although the Trafficking Act definition and further provisions predominantly satisfy the international requirements, certain unacceptable *lacunae* exist in the law. The failure to waive the requirement of the prohibited means in respect of child trafficking as well as the neglect to effect the provisions in respect of foreign victims of trafficking are material defects that must be addressed. Recommendations to remedy the legislative flaws are consequently made in order to strengthen South Africa’s international compliance.

Abstrak

Die Verenigde Nasies se Verdrag teen Transnasionale Georganiseerde Misdaad en die protokolle daartoe het as doel om internasionale misdaadverskynsels te voorkom. Die Protokol teen Mensehandel ("Palermo Protokol") is deur Suid-Afrika bekragtig en, sodoende, is Suid-Afrika verbonde tot sekere internasionale verpligtinge in die bestry van mensehandel. Die Palermo Protokol verplig Suid-Afrika, ondermeer, om omvattende wetgewing in die voorkoming en bestryding van mensehandel te promulgeer. Gevolglik het Suid-Afrika die Wet op die Voorkoming en Bekamping van Mensehandel, wet 7 van 2013, ("Mensehandel Wet") op 29 Julie 2013 afgekondig en het dit op 9 Augustus 2015 in werking getree. Die Mensehandel Wet skep die statutêre misdaad van mensehandel en poog verder om aan die internasionale vereistes te voldoen deur verdere verwante oortredings en verpligtinge te skep. Die Suid-Afrikaanse mensehandel definisie word in hierdie studie ontleed en met die internasionale misdaad en die elemente daarvan vergelyk ten einde te bepaal of die Suid-Afrikaanse misdaad die internasionale standard bevredig. Verdermeer, oorweeg die studie ook die geheel van die Suid-Afrikaanse regsraamwerk tot beskikking in die bekamping van mensehandel. In hierdie opsig word beide die beskikbare gemene reg en statutêre misdade voor en na inwerkingtreding van die nuwe wetgewing krities bespreek ten einde vas te stel of die algehele Suid-Afrikaanse regsraamwerk aan die drie internasionale verpligtinge van, eerstens, die kriminalisering van die vereiste gedrag, tweedens die beskerming en bystand van mensehandel slagoffers en, derdens, die voorkoming en bestryding van mensehandel, bevredig. Die studie oorweeg ook watter vorm van *mens rea* internasionaal sowel as deur die Mensehandel Wet aanvaar sal word. Die studie bevind dat die Suid-Afrikaanse mensehandel definisie wel aan die internasionale vereistes voldoen met die uitsondering van die gedrag wat gekriminaliseer word waar die mensehandel slagoffer minderjarig is. Suid-Afrika voldoen ook aan die verdere internasionale reg vereistes ten opsigte van slagoffer-beskerming en die skep van die vereiste voorkomingsraamwerk. Alhoewel die Mensehandel Wet en die verdere Suid-Afrikaanse regsraamwerk hoofsaaklik aan die internasionale vereistes voldoen, bestaan daar wel sekere onaanvaarbare tekortkominge in die Wet. Die nalate om die mensehandel definisie aan te pas deur die weglating van die vereiste metode element ten opsigte van handel van minderjariges sowel as die versuim om die bepalinge in verband met beskerming van buitelandse slagoffers in werking te stel, is wesenlike defekte wat aangespreek moet word. Die studie maak gevolglik sekere aanbevelings om hierdie en verdere wetgewende tekortkominge te remedieer met die doel om Suid-Afrika in sy internasionale nakoming en bevegting van mensehandel te versterk.

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A critical evaluation of South Africa's enactment of new anti-trafficking legislation in fulfilment of its international obligations to Prevent, Suppress and Combat the trafficking of persons under the Palermo Protocol

1. General introduction of the problem of trafficking in persons and the current legal framework

1.1. Introduction

The United Nations Convention against Transnational Organised Crime ("Palermo Convention") and the protocols thereto,¹ aim to prevent and combat the international phenomena collectively known as organised crime. Specifically, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children obliges South Africa, as United Nations ("UN") member that has ratified the Palermo Convention and a number of other international treaties, to promulgate legislation explicitly dealing with the prevention and combating of trafficking in persons.² Consequently, the Prevention and Combating of Trafficking in Persons Act 7 of 2013³ ("the Trafficking Act") was promulgated by the national legislature on 29 July 2013 and has come into operation on 9 August 2015.⁴ The Trafficking Act created the statutory crime of trafficking in persons along with different other punishable acts in order to combat trafficking in persons. Prior to the enactment of the Trafficking Act, South Africa lacked specific legislation criminalising crimes of trafficking in persons.⁵ Although successful prosecution of acts of this nature was scarce, there were, however, a few prosecutions under a diverse number of common law and statutory crimes that succeeded in bringing offenders to justice. In anticipation of the new legislation taking effect, Kruger and Oosthuizen wrote that successful prosecutions

¹ United Nations Convention against Transnational Organised Crime of 2000 and the protocols thereto.

² The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children is one of three protocols to the Palermo Convention known as the Palermo Protocols. They will hereinafter be referred to as the Palermo Protocols.

³ To give effect to the Republic's obligations concerning the trafficking of persons in terms of international agreements; to provide for an offence of trafficking in persons and other offences associated with trafficking in persons; to provide for penalties that may be imposed in respect of the offences; to provide for measures to protect and assist victims of trafficking in persons; to provide for the coordinated implementation, application and administration of this Act; to prevent and combat the trafficking in persons within or across the borders of the Republic; and to provide for matters connected therewith.

⁴ The Act came into effect by way of publication in the Government Gazette (Number 39078) of 7 August 2015.

⁵ In the preamble of the Act the legislature sets as one of the rationales behind the Act the fact that "*South African common law and statutory law do not deal with the problem of trafficking in persons adequately*".

under the common law and appropriate statutes have been on the increase.⁶ Most of these offences pertained to a form of sexual exploitation of the victim.⁷ Although the trafficking of persons for purposes of sexual exploitation is an immense problem, other forms of trafficking should not go unnoticed and unprosecuted. The Trafficking Act's definition of the offence broadens the scope of prosecutable trafficking acts enabling prosecution of non-sexually related forms of trafficking of persons such as cases of domestic servitude and forced labour.⁸ Laczko and Gramegna explains trafficking as an "umbrella term to cover a range of different actions and outcomes".⁹ Trafficking manifests as a process involving many different phases.¹⁰ The process of trafficking a person can involve phases of recruitment, transportation and control over such person in the eventual destination.¹¹ The broadening of the definition of trafficking in persons by the Act creates a statutory mechanism to prosecute the full process of the offence.

Within the diversity of phases in the trafficking process, there are many different role players.¹² The involvement of more than one individual in the accomplishment of the trafficking-result further complicates the effective prosecution of the comprehensive offence. Many writers and practitioners of law argued that the common law and statutory crimes under which trafficking in persons were prosecuted in South Africa were not comprehensive enough to truly address the criminal phenomenon of trafficking.¹³ This study also proposes that the current form of *mens rea* required for successful prosecution of these crimes is a further reason for this insufficiency. By analysing the new comprehensive crime of trafficking in persons, it is shown that the Act provides for wider prosecution by including more forms of *mens rea*. As trafficking in persons often involve organised crime syndicates and complex command systems, the widened scope secures greater prevention and combating of trafficking.

⁶ HB Kruger & H Oosthuizen "South Africa – Safe Haven for Human Traffickers? Employing the arsenal of existing law to combat human trafficking" (2012) (15)1 *PER/PELJ* 283 283-274.

⁷ 325-326. The successful convictions prior to the enactment of the Trafficking Act pertained mostly to sexual offences. For more detail on these convictions see footnote 121 below.

⁸ See the definition of "exploitation" in section 1 of the Trafficking Act. Kruger & Oosthuizen *South Africa - Safe Haven for Human Traffickers? Employing the Arsenal of Existing Law to Combat Human Trafficking* (2012) (15)1 *PER/PELJ* 326. N Mollema "Combating human trafficking in South Africa: A critical evaluation of the Prevention and Combating of Trafficking in Persons Act 7 of 2013 (2014) 77 *THRHR* 246 250.

⁹ F Laczko & MA Gramegna "Developing Better Indicators of Human Trafficking" (2003) *BJHA* (X)1 179 179-194.

¹⁰ Laczko & Gramegna (2003) *BJHA* (X)1 180.

¹¹ Laczko & Gramegna (2003) *BJHA* (X)1 179-194.

¹² Kruger & Oosthuizen "Looking behind the mask of confusion: towards a better understanding of human trafficking" (2011) 12(2) *Child Abuse Research in South Africa* 46 48; UNESCO *Policy Paper No 14.5 (E) Human Trafficking in South Africa: Root Causes and Recommendations* (2007) 8.

¹³ SA Law Reform Commission *Project 131 Trafficking in Persons Report* 10-11; HB Kruger *Combating Human Trafficking: A South African Legal Perspective* LLD thesis University of the Free State (2010) 417.

It is in light of the prior legislative limitations and South Africa's international obligations that the Prevention and Combating of Trafficking in Persons Act was promulgated. This study will argue that enactment of new anti-trafficking legislation providing for a wider definition of trafficking in persons as well as providing a greater basis for the presence of *mens rea*, provides a more suitable solution. It is argued that the promulgation of the Act and the legislative framework it sets in place to combat trafficking in persons, firstly, satisfies South Africa's international obligations and, secondly, broadens the scope of possible prosecution of such crimes. It will further consider how the new anti-trafficking legislation has been applied by South African courts and strive to make suggestions to enhance South Africa's efforts to combat the trafficking in persons.

1.2. Current legislative framework

Prior to the enactment of the Trafficking Act, South Africa lacked common law and statutory provisions criminalising the acts of trafficking in persons *per se*, that is, as a discreet crime or crimes¹⁴ Prosecution for acts of trafficking had to take place under the existing common law and statutory frameworks for crimes such as kidnapping, assault, abduction, under the common law, as well as statutory crimes created by the Criminal Law (Sexual Offences and Related Matters) Amendment Act ("Sexual Offences Amendment Act"), predominantly, and further when a specific act was not covered by the Sexual Offences Amendment Act, under other relevant legislative measures, including the Prevention of Organised Crime Act ("POCA"), the Immigration Act and the Basic Conditions of Employment Act.¹⁵ As trafficking of persons is much less an event than a process, prosecuting this complex act in parts limits the ability to prosecute the full extent of the crime, thus enabling many offenders to escape justice.¹⁶

It is further argued that the legal tools available to South African courts prior to the enactment of the Trafficking Act was more focused on trafficking with a sexual exploitation motive or acts of trafficking in children.¹⁷ Acts such as the Sexual Offences Amendment Act and the Children's Act enabled the courts to reach certain acts of trafficking in persons by providing for limited

¹⁴ W Horn *South Africa's legal compliance with its international obligations in respect of child trafficking* LLM thesis University of North-West (2009) 7.

¹⁵ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; Prevention of Organised Crime Act 121 of 1998; Immigration Act 13 of 2002; Basic Conditions of Employment Act 75 of 1997.

¹⁶ D Coleman "Trafficking in Persons: the current legal framework in South Africa - Sexual Offences and Community Affairs Unit NPA presentation" <<http://www.kznhealth.gov.za/ht.pdf>> (accessed 3 May 2019).

¹⁷ SA Law Reform Commission *Project 131 Trafficking in Persons Report* (2008) 10. The interim provisions promulgated by the South African legislature only addressed these limited forms of trafficking. For a more detailed discussion of this, refer to chapter 4.

criminal liability.¹⁸ The new legislation, under the international legislative guidance gathered from the Palermo Protocols, covers a much wider range of trafficking acts, thus providing a greater opportunity to effectively prevent this complex crime.¹⁹

1.3. The research question

Is the wider definition ascribed to trafficking in persons and the form of *mens rea* required under each criminalisation clause of the Act (sections 4, 8, 9, 10 and 11) in the first instance, sufficient to meet South Africa's international obligations and, secondly, sufficient to combat and prevent the problem of trafficking in persons in South Africa, taking cognisance of the diverse ways in which this offence manifests?

1.4. Research relevance and objectives

*"Intentions to combat the phenomenon can be ascertained from the adoption of several legal instruments and other counter measures by several countries. Concerted efforts in this regard indicate an acknowledgement of the negative impact of the phenomenon on the political, economic, and social structures of countries. However, sustainability of these efforts remains of serious concern. This is because efforts to combat human trafficking in its entirety are not new. What is new however, is the renewed interest and vigour with which countries are condemning the phenomenon."*²⁰

In light of current political, legislative and socio-economic occurrences, it is clear that trafficking in persons is a crime on the increase.²¹ The increase in public crimes of this nature has led to greater public awareness of the seriousness of the matter.²² As global awareness of the dilemma of trafficking in persons, especially women and children, grows, national concern over the problem increases as well.²³ This is clear when considering the efforts of countries to

¹⁸ For examples of convictions for human trafficking in terms of the Sexual Offences Act and Sexual Offences Amendment Act see *S v Sayed and Another* with case number 041/2713/2008 Durban Regional Court (unreported) (2008); *S v Eloff* with case number SH599/08 Welkom (2008) and *Dos Santos v S* 2018 1 SACR 20 (GP).

¹⁹ Mollema "Combating human trafficking in South Africa: A critical evaluation of the Prevention and Combating of Trafficking in Persons Act 7 of 2013 (2014) THRHR 247-249.

²⁰ RO Iroanya "Human Trafficking with specific reference to South African and Mozambican Counter-Trafficking Legislation" (2014) *Acta Criminologica: South African Journal of Criminology* 27(2) 102-107.

²¹ Preamble to the Trafficking Act.

²² Kruger *Combating Human Trafficking* 5.

²³ Kruger & Oosthuizen (2011) CARSA 45-65.

promulgate legislation to oblige with the Palermo Protocol's call thereto. Many countries, including South Africa, have acted with particular urgency in this matter.²⁴ In light of the United Nations Palermo Convention and the Protocols thereto that urges greater transnational efforts in the combat of this phenomenon, national legislation facilitating international cooperation is an imperative.²⁵

1.5. Aims of this study

*"Only by understanding the depth, breadth and scope of the [human trafficking] problem can we address the second issue, namely, how to counter it."*²⁶

In addition to this comment by the United Nations Office on Drugs and Crime ("UNODC"), it is submitted that in order to understand the newly defined South African crime of trafficking in persons, one must understand the ways in which the problem presents itself. As such, this study aims to discover the definition of the crime criminalised under the Trafficking Act and evaluate such definition at the hand of the modern-day manifestations of this crime.

This study aims to evaluate the national legislation South Africa has promulgated by doing the following:

1. analyse the definition of trafficking in persons as provided for in the United Nations Convention against Transnational Organised Crime and the protocols thereto;
2. analyse the definition of trafficking in persons and each criminalisation clause in the Trafficking Act in order to establish the scope of the South African form of the crime;
3. compare the international law definition with the crime defined in the new Trafficking Act;
4. compare the scope of trafficking in persons as crimes before and after the adoption of the Trafficking Act;
5. determine what comprises the required international law *mens rea* element by studying the relevant international instruments;

²⁴ South Africa enacted legislation as soon as nine years after the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children was ratified on 20 February 2013.

²⁵ In the Preamble to the Protocol the state parties declare "*that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach...*".

²⁶ UNODC *Global Report on Trafficking* (2009) 6.

6. analyse and compare the different forms of *mens rea* required by the new legislation; evaluate whether intent, negligence and different statutory forms of negligence created by the Trafficking Act are sufficient to encompass all acts of trafficking in persons especially indirect acts of trafficking, for example acts orchestrated and planned by one person and performed by another;
7. compare the international law requirement with the required *mens rea* element per the South African Act;
8. make suggestions for greater compliance with international legal obligations and effective prosecution of the crime of trafficking in persons.

1.6. Research methodology

This study predominantly utilises a research methodology based on a review of the existing literature in this field. Relevant legal literature will be reviewed in order to draw a comparison between the prior and current, yet relatively new, South African dispensation as well as considering the comprehensiveness of this dispensation in light of South Africa's international law requirements. Literature under review will consist of both international as well as South African sources. More international research studies on trafficking have been conducted than studies from and on the South African or, even, African context and legal framework surrounding trafficking in persons. In order to conclude whether South Africa meets its international requirements, a comparison will be drawn between the international legal requirements set out predominantly in the Palermo Protocol and South Africa's legal dispensation. A comparative legal study will form the basis of this part of the research question while elements of qualitative research will assist in understanding the nature of the trafficking phenomenon. The main instruments considered are international instruments such as the United Nations Convention Against Transnational Organized Crime, specifically the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and on, domestic level, South African common law, statutes and, in particular, the Prevention and Combat of Trafficking in Persons Act 7 of 2013. Further information has been acquired from textbooks, articles, reports, commentaries, interim regulations and court decisions. Case law primarily from South African courts will be discussed as well as relevant comparative decisions. Information obtained is used to compare the international position with South Africa's position. The South African position pre-Trafficking Act and post-Trafficking Act will be evaluated and compared to the international requirements as well as to each other. This comparative legal study will enable the formulation of theoretical results and conclusions in answer to the first leg of the two-pronged research question of whether South Africa's legislative dispensation pre- and post-promulgation of the Trafficking Act is adequate to meet its international requirements.

This study will also entail certain qualitative research aspects which will focus mostly on understanding the elements of the vast and various manifestations of the trafficking crime in the South African context. The findings from this qualitative evaluation will be utilised in answer to the second leg of the research question: whether South Africa's legislative measures are sufficient to combat the phenomenon of trafficking.

The South African legal literature post-promulgation of the Trafficking Act is exceptionally limited. As such, this study seeks to contribute to the body of criminal law knowledge in South Africa.

1.7. Policy on plagiarism

The Stellenbosch University's policy on plagiarism is recognised and has been adhered to. The work of this study is the writer's own original work. All ideas, material and intellectual property will be that of the writer's unless explicitly stated otherwise in which case any quotations from other sources will be referenced in full.

1.8. Limitation of study

This study will accept South Africa's international obligations as set out in the relevant international instruments and will accept that in all transnational matters cooperation will take place.

This study will be based on theoretical research. Empirical data or research will not be used to supplement findings to draw conclusions that can be verified by experiments or case studies.

2. International law obligations

“I believe the trafficking of persons, particularly women and children, for forced and exploitative labour, including for sexual exploitation, is one of the most egregious violations of human rights that the United Nations now confronts.”

– Kofi A. Annan ²⁷

The need and urgency in promulgating the Trafficking Act arose from the void that existed in terms of comprehensive anti-trafficking legislation in South Africa. However, even more so, the urgency stemmed from pressure from the international regulatory sphere. In order for South Africa to satisfy its international requirements and address the trafficking dilemma, the scope of the problem must first be understood.²⁸ As the international community has battled to formulate an all-encompassing definition of “trafficking in persons” for many decades, evidencing the complex nature of the crime, reaching a uniform understanding has proven to be a challenge. However, the United Nations, with various international inputs, has succeeded in crafting a sufficiently broad definition of the criminal concept of trafficking in persons. The source and point of departure in understanding South Africa’s international obligations on this subject is the international law position of the crime of *trafficking in persons*. The United Nations Convention against Transnational Organised Crime and specifically the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, being the “principal legally binding global instrument”²⁹, are considered the foundational legal instruments that sets out the scope of South Africa’s minimum obligations. In order to succinctly understand South Africa’s international obligations, an analysis of the obligations established by the Palermo Protocol will be done. The obligation to criminalise certain conduct forms the specific focus of the protocol. As such, the requirement to enact legislation to combat and prevent acts of human trafficking must be considered, with specific attention to the internationally required definition and elements of the crime, the recognised means to perform the crime and the scope given by the Convention for state parties to adapt their legislation to their specific domestic circumstances.

2.1 The relevant Protocols and enforcement bodies

On 15 November 2000 in Palermo, Italy the United Nations adopted the following international instruments in response to the need to establish a comprehensive international framework to

²⁷ K Annan Address at the Opening of the Signing Conference for the United Nations Convention Against Transnational Organized Crime Palermo (12 December 2000).

²⁸ UNODC *Global Report on Trafficking* (2009) 6; Kruger & Oosthuizen (2011) *CARSA* 45-65.

²⁹ UNODC *Analysis of key concepts of the Trafficking in Persons Protocol* (2010) 2.

combat organised crime of which trafficking in persons, specifically women and children, was a priority offense:³⁰

1. The United Nations Convention against Transnational Organized Crime;
2. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime; and
3. The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

Relevant to this study, is the first two abovementioned documents: the Convention against Transnational Organised Crime and, most relevant in determining South Africa's international obligations regarding the prevention of trafficking in persons, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime ("the Palermo Protocol"). As UN member that has ratified the Convention and protocols, South Africa is to adhere to its imperatives. By reason of parliament's ratification of the Convention and the supplementary protocols thereto, South Africa is bound to the provisions thereof.³¹ As far as these international instruments require South Africa to promulgate legislation in accordance therewith, South Africa is, therefore, internationally obligated to incorporate the essential criminalisation and enforcement mechanisms provided for in the Convention and Palermo Protocol into domestic legislation, thus transforming international obligations into domestic law.³² As far as aspects of these international instruments conform to existing precepts of customary international law, such as slavery-like acts, they form part of the South African domestic criminal law by virtue of section 232 of the Constitution, 1996, and do not require further enactment by the South African parliament.³³ However, from both doctrinal and practical points of view it is necessary to

³⁰ The Convention and the protocols thereto were adopted internationally by way of General Assembly Resolution 55/25 of 15 November 2000.

³¹ Section 231(2) of the Constitution reads:

"(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3)."

³² For a discussion of the international requirements to promulgate legislation in terms of these acts refer to chapter 1 and 2.1.2 below.

³³ Slavery is an example of a customary international law offence. Where acts of trafficking conform to the crime of slavery, as it often does in cases of trafficking for purposes of forced labour, such acts are also offences in South African domestic law by reason of section 232 of the Constitution. Refer to Dugard *International Law* (2005) 156-157 and SA Law Reform Commission *Project 131: Trafficking in Persons Report* 14. Section 232 of the Constitution dictates:

transform the international obligations into South African criminal law via legislation rather than to rely on the customary status of some aspects of trafficking (notably slavery) via section 232 of the Constitution. This is so primarily because of the demands of the principle of legality and because of the need for clear and practically enforceable criminal norms.³⁴

2.1.1. The United Nations Convention against Transnational Organized Crime (“the Convention”)

The relevance of the Convention in the context of human trafficking lies therein that it is the foundational document to which the Palermo Protocol is supplementary. As such, any interpretation of the Palermo Protocol, its purpose and requirements must be done with an understanding of the Convention’s purpose and requirements.³⁵

Article 1 of the Palermo Protocol provides:

“Relation with the United Nations Convention against Transnational Organized Crime

1. *This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.*
2. *The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein.*
3. *The offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention.”*³⁶

“232. Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”

³⁴ G Ferreira & A Ferreira-Snyman “The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism” (2014) 17 PER 4; Dugard *International Law* 42-43. In the Constitutional Court decision of *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) (“*Glenister*”) the court was held that ratified international agreements that become binding on South Africa due to such ratification are not automatically statutory law but do contain domestic obligations on South Africa which are enforceable on international level. The court further held that when an international agreement is enacted into domestic statutory law, it creates only statutory rights and obligations and not *per se* Constitutional rights or obligations. Refer to paragraph 181 of the *Glenister* judgement. On the constitutional law and criminal law requirements of transforming international norms into domestic criminal law, see G Erasmus & G Kemp “The application of international criminal law before domestic courts in the light of recent developments in international and constitutional law” 2002 *South African Yearbook of International Law* 64.

³⁵ Article 37(4) of the Convention specifically provides: “Any protocol to this Convention shall be interpreted together with this Convention, taking into account the purpose of that protocol”; Article 1(1) of the Palermo Protocol; J Allain *No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol*, <https://pure.qub.ac.uk/portal/files/11807877/No_Trafficking_Definition_Exists_27_August.doc> (accessed 9 August 2018).

³⁶ Article 1 of the Palermo Protocol.

The wording of article 1 sets a clear correlation between the Convention and the Palermo Protocol. As supplementary to the Transnational Organized Crime Convention, the Palermo Protocol must be read and interpreted together with the provisions and purports of the Convention.³⁷ The UNODC Model Law against Trafficking in Persons (“Model Law”), further, emphasises the cooperation that is required between the Protocol and its “parent” Convention. The Model Law explains the interaction between the two international instruments by distinguishing which matters fall within the scope of each. Matters of international cooperation, participation in an organised criminal group, corruption and money-laundering fall within the scope of the Convention but are regularly associated with incidences of trafficking. The introductory paragraph to the Model Law reiterates the obligation on member states to promulgate legislation that is in line and in adherence to the Convention as well as to the Palermo Protocol.³⁸ Prior to the Convention, which came into effect in 2000, South Africa had promulgated domestic law in the form of the Prevention of Organised Crime Act (“POCA”).³⁹ South Africa has, therefore, expressed an intention to prevent organised crime ranging from before being internationally bound to do so by the terms of the Convention.⁴⁰ The legislation that South Africa is required to implement in compliance with the Palermo Protocol will therefore work together with POCA to ensure accomplishment of the over-arching goal of prevention of organised crime. It remains vital that the provisions of the Convention and Palermo Protocol be read and implemented in conjunction to ensure that the Convention’s obligations inform and underpin the provisions in the Trafficking Act that seek to comply with the Palermo Protocol. The relevant provisions of the Convention that bear impact on the Palermo Protocol and, therefore, on the requirements which South Africa’s Trafficking Act must meet, are considered.

2.1.1.1. Purpose

“Article 1. Statement of purpose

The purpose of this Convention is to promote cooperation to prevent and combat transnational organized crime more effectively.”⁴¹

As the Palermo Protocol is supplementary to the Convention, the Convention’s purpose will have bearing on the Palermo Protocol. Article 1 states that the purpose of the Convention is to prevent and combat “organized crime”. The concept “organized crime” is specifically defined by the Convention. Read with article 1 of the Palermo Protocol, the impact that this purpose

³⁷ Article 37(4) of the Convention and article 1(1) of the Palermo Protocol.

³⁸ Introduction to the Model Law 1.

³⁹ Prevention of Organised Crime Act 121 of 1998.

⁴⁰ POCA was promulgated into in 1998 and came into effect on 21 January 1999.

⁴¹ Article 1 of the Convention.

statement has on the Palermo Protocol is not restricting but merely informative towards the purpose of the Palermo Protocol. It therefore does not limit the scope of the Protocol to only crimes of trafficking that meet the requirements of “organized crime” but suggests that the scope thereof must also include the prevention of trafficking that is part of organised criminality. Article 4 of the Model Law, in setting out the proposed scope of trafficking legislation, expressly provides that trafficking law should “*apply to all forms of trafficking in persons, whether national or transnational and whether or not connected with organized crime*”.⁴² As such, the relation between the two international instruments is supplementary in nature. The South African counterpart in respect of trafficking must ensure that it provides that trafficking in both organised crime format and in singular or opportunistic forms be combatted.

2.1.1.2. Criminal provisions: basic criminal offences as a foundation for trafficking offences

The Model Law, chapter IV, refers to certain provisions of the Convention that are the basic criminal offences that ought to be criminalised by a complying member state.⁴³ These provisions are:

- 2.1.1.2.1.** Article 5: Criminalisation of participation in an organised criminal group
- 2.1.1.2.2.** Article 6: Prohibition against the laundering of the proceeds from a crime
- 2.1.1.2.3.** Article 8: Criminalisation of corruption
- 2.1.1.2.4.** Article 23: Criminalisation of obstruction of justice
- 2.1.1.2.5.** Article 10: Liability of legal persons

The chapter of the Model Law following the abovementioned chapter IV, refers to provisions *specific* to trafficking as opposed to chapter IV which refers to the offences forming the *foundation* for trafficking offences.⁴⁴ As such, the Model Law reminds us that South Africa is obliged to criminalise the foundational crimes and, in so doing, to provide measures by which legal entities too can be held liable for these offences in terms of the Convention. Although the obligation is not included under the Palermo Protocol, the specific inclusion of this chapter IV in the trafficking Model Law indicates that the national legislation to be promulgated by a member state is, at a minimum, to be drafted with these criminalisations in mind. Although the Palermo Protocol does not explicitly provide that the national legislation that is promulgated to combat and prevent human trafficking should expressly provide for these crimes in the same legislative document, the Model Law clarifies that it is expected that the national trafficking legislation

⁴² Article 4 of the Model Law 8.

⁴³ Chapter IV of the Model Law 23.

⁴⁴ Chapter V of the Model Law 24.

should at least be in agreement with such criminalisation. Understanding that the Model Law is a suggestion to guide states, not binding on parties, one cannot infer a legal obligation to provide for these crimes specifically in the context of trafficking unless the Palermo Protocol created such obligation. However, the inclusion of reference to the Convention offences in the Model Law is a clear indication by the broader international legal and policy community that it would be preferred that a firm relation exists between the legal provisions that criminalises trafficking and the criminalisation structure of the Convention offences. Thus, in the South African context, the Trafficking Act does not have to be the document in which the involvement in an organised criminal group, money laundering or corruption are prohibited so long as these are prohibited in some other way and prohibited in relation to the illegal acts of trafficking as defined in the Trafficking Act. It can, however, be deduced from the inclusion to the Model Law that it would be preferred to have these Convention offences specifically criminalised in the context of trafficking in persons under the national legislation that provides for the combat and prevention of trafficking, such as the Trafficking Act. Chapter IV, then, supports the view that the Convention's prohibition of organised crime is not prohibited to the crimes specifically mentioned in the Convention itself but as necessity also extends to the specific offences criminalised under the protocols to the Convention. As such, the South African legislation must also provide for the criminalisation of organised criminal activity as prohibited by the Convention (and POCA) in the context of trafficking in persons.

2.1.1.3. Other relevant provisions of the Convention

2.1.1.3.1. Extraterritorial jurisdiction

Article 15 of the Convention regulates the issue of jurisdiction. Article 15 firstly obligates member states to establish general territorial jurisdiction for offences created by the Convention and the supplementary Protocols thereto, when commissioned within the territory of the state.⁴⁵ The Convention further requires states to also provide measures to establish extraterritorial jurisdiction, albeit required only in a limited sense.⁴⁶ Article 15(3) of the Convention requires states to establish jurisdiction over offences committed outside of the jurisdiction of that state by nationals of the state in cases where such national is not extradited by reason of nationality. In such instances, the member state of which the offender is a national must prosecute the crime in the state's own courts.⁴⁷ This form of extraterritorial jurisdiction is mandatory. As the Palermo Protocol does not address extraterritorial jurisdiction, these provisions of the Convention are the minimum requirements to which ratifying states must adhere. Article 15(2) of the Convention allows states to further extend their jurisdiction in cases where the offence was committed

⁴⁵ Article 15(1) of the Convention.

⁴⁶ Article 15 and 16(10) of the Convention.

⁴⁷ Article 16(10) of the Convention.

against one of its nationals, committed by a national of that state, by a stateless person which has his or her habitual residence in the territory of the state, or the offence is an offence under articles 5(1) and 6(1) of the Convention committed outside of the state's territory with the purpose, in cases of an article 5 offence, to commit a serious crime within the state's territory or in the case of article 6 offences, with the purpose to launder proceeds of the crime. As such, South Africa is at minimum required to provide for extraterritorial jurisdiction over trafficking offences committed by one of its nationals that have not been extradited on grounds of such nationality.

2.1.1.3.2. **Confiscation and seizure**

Article 12(1) of the Convention demands that states adopt "to the greatest extent possible within their domestic legal systems" measures to ensure that proceeds generated from crimes covered by the Convention or property to a corresponding value as well as any property, equipment or instrumentalities used in the commission of the offence be confiscated. Article 12(2) of the Convention requires states to provide further measures that enable the "*identification, tracing, freezing or seizure*" of any of the items referred to in paragraph 1 of article 12 for the purpose of eventual confiscation. The Convention further requires state parties to include provisions that allow cooperation between different states in order to ensure that proceeds from crimes, whether these proceeds have been transferred or converted into property or otherwise, be confiscated.⁴⁸ Member states must specifically provide a procedure by way of which the state can make requests to another state in order to confiscate crime proceeds or instrumentalities situated in the territory of that other state. In case of such request, the other state must submit the request to the requisite authorities to obtain an order of confiscation. The measures provided by the state must also enable that state to identify, trace, freeze and/or seize the items that are to be confiscated.⁴⁹ These measures are necessary in order to have the requisite deterrent effect on further commissions of the crime. As such, they are essential in fulfilment of member states' obligation to prevent the crimes established by the Convention, which include the crimes established by the protocols to the Convention and, as such, trafficking in persons. Party states are, therefore, required to provide, to the greatest extent possible, for the identification, tracing, freezing, seizing and consequent confiscation of crime proceeds, equipment and other instrumentalities used in committing the offence as well as to provide for international request and delivery of such proceeds to other party states in relevant cases.

⁴⁸ Article 13 and 14 of the Convention.

⁴⁹ Article 13(2) of the Convention.

2.1.2. **The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (“the Palermo Protocol”)**

With a resurgence of the age-old human rights violation of slavery in an evolved form of cross-border organised trafficking in persons, especially that of women and children, the international community was urged to investigate a new approach to the combat and prevention of this criminal phenomenon. The trafficking in people for exploitative purposes is multi-faceted.⁵⁰ The variety of aspects that could be involved or with which an overlap could occur ranges from domestic and cross-border trafficking, slavery, the illegal smuggling of migrants, exploitations for various purposes and the involvement of organised criminal groups necessitated the crafting of clear and certain definitions that could be used in an effective comprehensive international approach to addressing these problems.⁵¹ Conventions against slavery exist from as far back as 1902.⁵² As the slave trade has developed, the international community has answered with adapting its legal framework against this ancient crime.⁵³ This development culminated in the enactment of the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (“1950 Convention”).⁵⁴ The 1950 Convention is generally recognised as the first international treaty against trafficking in persons, although limited to trafficking for the purpose of prostitution.⁵⁵ During the 1990’s, trafficking in persons was again considered by the United Nations. This focus was mostly due to the impact of technology and globalisation on international crime and an increase in trafficking of women for prostitution purposes. It was noted that what was specifically lacking from the various existing international instruments was a comprehensive universal definition of trafficking in persons.⁵⁶ An in-depth, decade-long process of conceptualising a comprehensive international definition for trafficking in persons was started. Recognising that any effective modern-day trafficking

⁵⁰ T Obokata “A Human Rights Framework to Address Trafficking of Human Beings” (2006) 24(3) Netherlands Quarterly of Human Rights 379 379-380.

⁵¹ Preamble of the Palermo Protocol.

⁵² The first international agreement against slavery was the International Agreement for the Suppression of White Slave Traffic of 18 May 1904 (“1904 White Slave Traffic Agreement”).

⁵³ The 1904 White Slave Traffic Agreement, the International Convention for the Suppression of Traffic in Women and Children of 1921 (“1921 Convention”), the Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention 1926 (“1926 Slavery Convention”) and the International Convention for the Suppression of the Traffic in Women (“1933 Convention”) were the four conventions combined to produce the 1950 Convention. For a detailed discussion of the development of slavery and the international legislative response thereto, see Mollema *Combating Human Trafficking in South Africa: A Comparative Legal Study* LLD thesis UNISA (2013) 21.

⁵⁴ The Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, 21 Mar 1950, came into force on 25 July 1951.

⁵⁵ Article 1(1) of the 1950 Convention; Mollema *Combating Human Trafficking in South Africa* 28.

⁵⁶ Preamble of the Palermo Protocol.

definition will have to prohibit trafficking for any exploitive purpose, the definition of trafficking in persons provided for in the Palermo Protocol was promulgated.⁵⁷

2.1.2.1. Purpose

Article 2 of the Protocol sets out the statement of purpose of the Palermo Protocol:

“Article 2

Statement of purpose

The purposes of this Protocol are:

- (a) To prevent and combat trafficking in persons, paying particular attention to women and children;*
- (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and*
- (c) To promote cooperation among States Parties in order to meet those objectives.”⁵⁸*

From the title of the Palermo Protocol three main purposes are clear: to prevent, suppress and punish the acts of trafficking in persons. Paragraph (a) of the above purpose statement confirms these three main purposes. Yet the Protocol further broadens the purpose by adding as a specific aspect to protect and assist victims of trafficking in paragraph (b) of the purpose statement. The Palermo Protocol, therefore, has a further purpose beyond the prevention, suppression and punishment of the offense to also address the consequences of the trafficking offense.

Paragraph (c) states that the Protocol will also address cooperation amongst UN member states transnationally with the purpose to meet “those objectives”, those objectives being the purposes stated in paragraphs (a) and (b): to prevent and combat trafficking in persons; and to protect and assist victims of such trafficking. It is therefore expected that the Protocol will impose certain international obligations on member states and, as a necessity, these impose similar legislative requirements to be incorporated in the national legislation of member states to provide for the co-working between countries to meet “those objectives”.

The prevention and combating of the trafficking of persons are the ultimate imperative of the Palermo Protocol. Although a specific emphasis is placed on the trafficking of the vulnerable and more exposed victims, who form the majority of trafficked persons, women and children, this does not in any way limit the scope of the Palermo Protocol’s ambit to prevent, suppress

⁵⁷ E Pearson *Human Traffic, Human Rights: Redefining Victim Protection* (2002) 15.

⁵⁸ Article 2 of the adopted Palermo Protocol.

and punish the trafficking in all persons. In contrast to this notion, the preamble to the Model Law succinctly prescribes that “*all actions and initiatives against trafficking in persons must be non-discriminatory and take gender equality into account, as well as a child-sensitive approach*”⁵⁹. The Model Law introduction also requires member states to ensure that the trafficking law promulgated is in line with its constitutional principles.⁶⁰ Section 9 of the Constitution of the Republic of South Africa, 1996 (“Constitution”) provides for the equality of all persons. Section 9 of the Constitution further provides equal protection for all persons as part of this right to enshrined right to equality. As such, South Africa’s trafficking legislation is required to provide for equal protection and prosecution, for that matter, of all individuals whilst still ensuring protection of the vulnerable, especially women and children.

2.1.2.2. **Obligations created in terms of the Palermo Protocol**

The Palermo Protocol places three main categorical obligations on member states:

1. the obligation to criminalise certain offenses defined in the Palermo Protocol, the main offense being that of trafficking in persons;⁶¹
2. the obligation to protect and assist victims of trafficking;⁶²
3. the prevention, cooperation and other measures obligation.⁶³

The nature of each of these obligations, with specific focus on the obligation to criminalise, will be discussed below.

2.1.2.2.1. **Obligation to criminalise**

The Palermo Protocol creates the obligation requiring member parties to adopt legislation that criminalises the offences introduced by the Palermo Protocol. Article 5 is the main criminalisation provision and reads:

⁵⁹ Preamble to the Model Law 5.

⁶⁰ Introduction to the Model Law 1.

⁶¹ Article 5 of the Palermo Protocol.

⁶² Part II of the Palermo Protocol, articles 6 to 8.

⁶³ Part III of the Palermo Protocol, articles 9 to 13.

*“Article 5**Criminalization*

1. *Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.*
2. *Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:*
 - (a) *Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;*
 - (b) *Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and*
 - (c) *Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.”*

The point of departure to understanding this obligation is to understand the “offence established in accordance with paragraph 1” of the Palermo Protocol. Paragraph 1 of article 5 prescribes that a member state is to adopt the necessary legislative and other measures to create as criminal offences the conduct set out in article 3 of the Palermo Protocol. The definition of what conduct will constitute “trafficking in persons” to be criminalised by member states is found in article 3(a) of the Protocol.

2.1.2.2.1.1. **Definition – the offence established in article 3 of the Palermo Protocol**

For centuries the international community has struggled, but continued to attempt, to configure an accurate definition of what amounts to trafficking in persons.⁶⁴ With the vastness of measures in means by which the trafficking problem manifests, achieving an all-encompassing scope has proven to hold extreme difficulties, especially from a legal point of view. However, the UNODC has conducted substantial negotiations to conclude the definition that is put forth in the Palermo Protocol.⁶⁵ The formulation of this definition marks a victorious milestone in the combat of trafficking in persons.⁶⁶

⁶⁴ C Rijken *Trafficking in Persons: Prosecution from a European Perspective* (2003) 54.

⁶⁵ During the 1990's various human rights activists and countries partook in discussions in formulating an accurate definition. Noteworthy is the discussions that took place at the World Conference on Human Rights in 1993 in Vienna and the discussions at the World Conference on Women in 1995 in Beijing.

⁶⁶ Kruger & Oosthuizen (2011) CARSA 47; KE Hyland *The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (2001) 8(2) Human Rights Brief 38.

2.1.2.2.1.2. **Article 3(a) definition of “trafficking in persons”**

Article 3(a) of the Palermo Protocol puts forth the following comprehensive definition of the offence “trafficking in persons”:

“(a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;”

The Palermo Protocol definition, complex as it may be, describes the crime of trafficking by essentially breaking it down into three elements: the prohibited actions, the prohibited means, and the exploitative purpose. In short, Kruger and Oosthuizen explain that the Protocol describes the definition by stating what is done (act), how it is done (method) and why it is done (purpose).⁶⁷

The UNODC Model Law against Trafficking in Persons is designed to assist states that have ratified the Protocol in implementing its provisions. The Model Law provides model provisions that can be legislated by member states in adherence to the requirements of the Palermo Protocol. It further provides guiding commentary on each such provision whilst distinguishing between mandatory and optional provisions. As such, full compliance with the Model Law is not required seeing that its very nature is to provide an “example to follow” rather than a cast-in-stone rule of law or even strict guideline. The Model Law has specifically been crafted so as to provide flexibility to each state to incorporate their unique legal context. As such, it is a suitable guidance in a study of the obligations brought about by the Palermo Protocol.

The introduction to the Model Law (of which it is clearly stated that it does not form part of the content of the Model Law but merely constitutes an “explanatory note on the genesis, nature and scope” of the Model Law) clarifies that the general provisions and definitions of the Model Law form an integral part of the Model Law and as such no distinction is made in respect of mandatory and optional provisions. Although these are not necessarily specifically required by the Protocol, they remain an accurate standard to measure what is obligated by the Protocol.

⁶⁷ Kruger & Oosthuizen (2011) *CARSA* 47.

The Protocol defines trafficking in article 3 whilst article 5 creates the obligation to criminalise a similar offence. What is required to be criminalised in compliance with the Protocol will forthwith be discussed, taking the guidance of the Model Law into consideration.

2.1.2.2.1.3. The prohibited actions element

The actions of recruitment, transportation, transfer, harbouring or receipt of persons are defined as the actions prohibited by the Protocol. These in themselves are not enough to constitute the offence of trafficking. The required prohibited method (means) must have been implemented in effecting the action and must have been performed for the specific purpose of exploitation of the victim. Trafficking generally starts with the recruitment of a victim.⁶⁸ The victim will generally then be transported to a location to be received and harboured, either at the end destination or *en route*, both included in the scope of the prohibited action, to there be exploited. It is clear that trafficking is much rather a process than an isolated incident or event.⁶⁹ The inclusion of all of these prohibited actions covers the different phases which the trafficking process may entail. However, by listing the prohibited actions and separating each action by “or”, instead of “and”, indicates the intention to prohibit all the listed actions independently of each other and not necessarily as a collective. As such, the Protocol prescribes the criminalisation of each individual act as prosecutable “trafficking”. Further to this, the definition also does not prescribe that the various actions within the chain of the trafficking offence be performed by the same person. Proscription of each different participant’s role can be achieved under the same crime definition which will criminalise one person’s achievement of the full trafficking process. This begs the question whether one individual could be found guilty on multiple charges of trafficking in persons with each charge being for each different prohibited action albeit in the completion of one and the same “trafficking chain”. For example, X, a Mongolian national, recruits C, a national of South Africa, (by means of force) to work as a slave in a Mongolian mine. X ships C across to Mongolia, receives C into his custody upon arrival in Mongolia and harbours C as a slave thereafter. Would South African authorities be able to prosecute X for trafficking based on the action of recruiting C (which recruitment was attained by force) for the purpose of exploitation of C whilst Mongolian authorities retain the right to prosecute X based on the action of harbouring C (which harbouring was attained and maintained by force) for the purpose of exploitation of C? For the general legal mind it would seem like a duplication of charges,

⁶⁸ MY Mattar “Trafficking in persons, especially women and children, in countries of the Middle East: The scope of the problem and the appropriate legislative responses” (2002) 26(3) *Fordham International Law Journal* 721 724.

⁶⁹ Obokata (2006) 24(3) *Netherlands Quarterly of Human Rights* 380; Iroanya (2014) *Acta Criminologica* 2.

however, it would seem the Protocol provides for this. This question will further be discussed in respect of the South African Trafficking Act.

Neither the Palermo Protocol nor the Model Law prescribes definitions for the prohibited actions (recruitment, transportation, transfer, harbouring or receipt of persons) and, as such, the ordinary meaning of these words are to be ascribed to them in interpreting them. In interpreting the Protocol, the ordinary meaning of the words in terms of international law would need to be applied. However, the international law ordinary meaning might differ from that of the South African law. The obligation imposed on member states, including South Africa, is to provide criminalisation of the prohibited acts based on their ordinary meaning in the international law context so as to provide, as purposed, effective cross-border as well as local measures against trafficking in persons. As no definitions for these prohibited action concepts are included, it is accepted that the UNODC either provided that the definitions internationally and locally will be similar, or similar enough, so as to render definitions redundant or they intended to provide member states with enough flexibility to ensure the actions prohibited in terms of national legislation is sufficient to suppress the crime in the forms in which it manifests in that specific state. It is submitted that both the above reasons (for neglect of definitions for these terms) are applicable. The introduction to the Model Law states that the Model Law is a mere guideline, *“designed to be adaptable to the needs of each State, whatever its legal tradition and social, economic, cultural and geographical conditions”*.⁷⁰ Kruger and Oosthuizen acknowledge, in discussion of the prohibited actions element, that the “Palermo Protocol’s definition is formulated broadly”.⁷¹ It is concluded that South Africa has the scope to adopt a definition suitable to the form and manner of trafficking witnessed in South Africa.

Based on the above, South Africa is obligated to:

1. prohibit the actions of recruitment, transportation, transfer, harbouring or receipt of persons as an element of the trafficking crime; and
2. provide that any one action listed can be prosecuted as trafficking in persons independent of any further actions (subject to the existence of further two elements of the prohibited means and exploitative purpose requirement).

2.1.2.2.1.4. **The prohibited means element**

The second element of trafficking that the Protocol prescribes is the use of certain methods or means to achieve the prohibited action. The second part of the definition reads as follows, consisting of the bulk of the definition:

⁷⁰ Introduction to the Model Law.

⁷¹ Kruger & Oosthuizen (2011) *CARSA* 48.

“by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person”

As such, the prohibited means in terms of the Palermo Protocol are the use of or threat of:

- force, or other means of coercion;
- abduction;
- fraud;
- deception;
- abuse of power or of a position of vulnerability; or
- giving or receiving of payments or benefits to achieve the consent of a person having control over another person.

These can generally be grouped into three main categories: force, deception and abuse of power or of a position of vulnerability. The requirements under each are discussed below.

2.1.2.2.1.4.1. **Force**

The term “force” is not defined by the Protocol or the Model Law. The term “force” ordinarily means *“coercion or compulsion, especially with the use or threat of violence”*⁷², implying that the person being forced does not have the freedom of choice in respect of the action that he or she is being forced into. “Coercion” is similarly not defined by the Protocol. The Model Law refers to the US State Department Model Law to Combat Trafficking in Persons’ definition of “coercion” as an example of such definition:⁷³

“(e) “Coercion” shall mean use of force or threat thereof, and some forms of non-violent or psychological use of force or threat thereof, including but not limited to:

- (i) Threats of harm or physical restraint of any person;*
- (ii) Any scheme, plan or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person;*
- (iii) Abuse or any threat linked to the legal status of a person;*
- (iv) Psychological pressure;”*

⁷² Second definition of “force” [noun], Oxford living dictionaries <<https://en.oxforddictionaries.com/definition/force>> (accessed 22 November 2018).

⁷³ US State Department Model Law to Combat Trafficking in Persons 2003.

The Protocol prohibits both the use or threat of 1) force and 2) other forms of coercion. In reading these two definitions in conjunction, it is clear that the Protocol prohibits both violent and non-violent means of force or coercion. The application of actual force, abduction and actions generally equated with a physical breach of a person's right to bodily integrity as well as "other means of coercion", including a threat to breach of a person's bodily integrity are also barred. A wide range of forceful actions are precluded such as abduction, assault, as well as any threat to these or other violent measures. By prohibition of "other means of coercion" it is clear that the methods listed are not exhaustive. This indicates that a broad definition must be ascribed to the prohibited means of force or coercion.⁷⁴ Kruger and Oosthuizen further indicate that the threat of force does not have to be directed at the victim of trafficking. Coercion by manner of threats or intimidation or actual force such as assaults, against family or the beloved of the victim also constitute coercion prohibited by the Protocol. Although Kruger and Oosthuizen mention this type of conduct under the ambit of "coercion", it is submitted that the use of force against individual/s that are not the trafficked victim him- or herself will also classify as the required "force" in order to meet this element of the crime. When considering the Model Law definition of "forced labour or services" it confirms that "force" refers to a person not subjecting him- or herself to the coerced deed voluntarily.⁷⁵ As such, indirect force and/or coercion (against a non-victim) will bring about the required prohibited means in trafficking and individual providing it causally led to the trafficking of the victim by application of the *causa sine qua non* rule.

2.1.2.2.1.4.2. Deception

The term "deception" is not defined in the Palermo Protocol. The, ancillary guidance issued in interpreting the Protocol shall be referred to. The Model Law provides the following as definition of deception:

- "(f) *"Deception" shall mean any conduct that is intended to deceive a person;*
or
"Deception" shall mean any deception by words or by conduct [as to fact or as to law], [as to]:
 (i) *The nature of work or services to be provided;*
 (ii) *The conditions of work;*

⁷⁴ Kruger & Oosthuizen (2011) CARSA 49; Rijken *Trafficking in Persons: Prosecution from a European Perspective* 63.

⁷⁵ The Model Law definition of "forced labour or services" shall mean all work or service that is exacted from any person under the threat of any penalty and for which the person concerned has not offered him- or herself voluntarily'.

- (iii) *The extent to which the person will be free to leave his or her place of residence; or*
- [(iv) *Other circumstances involving exploitation of the person.*]

As can clearly be seen from the wide scope of the above quoted definition, the Protocol does not wish to limit the scope of what might constitute “deception” in the legislation of a member state. The inclusion of optional sub-paragraph (iv) of this definition provides member states with scope to define the term in the widest terms necessary to prohibit trafficking in their context. Two schools of thought can exist in this regard. It could be that the Protocol’s lack of definition in this regard grants members the freedom to determine a definition applicable to their context, at their own legislative discretion, which definition must only meet the purpose of being able to prohibit human trafficking within the borders of that state. In other words, states would be able to potentially limit the definition of “deception” by only including sub-paragraphs (i) to (iii) in the state’s deception definition. On a narrow reading of the law, that would suffice to be compliant for Palermo Protocol purposes. The second line of reasoning would dictate that although the Protocol does not specifically place an express obligation on member states to utilise the full, wider definition (inclusive of sub-paragraph (iv)), the lack of the definition in the Protocol itself can be interpreted as a mandate to define “deception” in its widest form possible so as to meet the criteria of being able to prosecute all forms of trafficking possible within the member’s borders and abroad. Kruger and Oosthuizen seem to support this latter view by stating that the broader definition must be utilised to “cover the range of deceitful methods” implemented in trafficking of persons.⁷⁶

What is significant, is that the deception is not limited to the nature of the services but further extends to deception in respect of the conditions under which these services are rendered. In other words, should a victim consent to the rendering of services such as prostitution, labour or other, but the circumstances are not as promised, this will constitute “deception” bringing the actions of transporting and/or harbouring the victim at the place where services are to be delivered under the ambit of prosecutable trafficking.⁷⁷

2.1.2.2.1.4.3. **Abuse of power or of a position of vulnerability**

The inclusion of this as prohibited mean confirms that trafficking can be done without the application of overt force.⁷⁸ This method refers to and would mostly be dependent on a

⁷⁶ Kruger & Oosthuizen (2011) *CARSA* 49.

⁷⁷ Kruger & Oosthuizen (2011) *CARSA* 48-49; Model Law 26; A MacKinnon “Trafficking, Prostitution and Inequality” (2011) *Harvard Civil Rights-Civil Liberties Law Review* 271 271-277.

⁷⁸ Commentary to the Model Law 24.

relationship in terms of which the victim is subject to the control and/or power of another. The terms “abuse of power” and “abuse of a position of vulnerability” are also not defined in the Palermo Protocol. The method of “*the giving or receiving of payments or benefits to achieve the consent of a person having control over another person*” also falls under this category. In all three scenarios (abuse of power, abuse of position of vulnerability and giving or receiving of benefits) the terms are undefined and, as such, to be interpreted in their widest sense.

Kruger and Oosthuizen suggest that the “abuse of power” refers to situations where individuals in authoritative positions over victims “use their powers inappropriately” to facilitate trafficking.⁷⁹ These could include parents, aunts or uncles, teachers, employers or religious leaders.⁸⁰ Rijken further includes the confiscation of identification and travel documents as “abuse of power”.⁸¹ This view is supported by paragraph 4 of article 8 of the Palermo Protocol. Paragraph 4 of article 8 provides that a member state of which a national or permanent resident that was a victim of trafficking which is being repatriated to the victim’s resident state “*shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory*”. The implication is that the confiscation of such documents rendered the victim without the ability to control their own legal travel and, therefore, their return to their home. Therefore, by such confiscation the confiscator exercises a form of power over the victim.

In respect of the “abuse of a position of vulnerability” the interpretative notes to article 3 of the Protocol notes:

*“(a) The reference to the abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.”*⁸²

The Model Law does not provide further guidance or examples as to what would constitute a “vulnerability” implying a broad interpretation is to be adopted. Any form of vulnerability can be abused in order to facilitate this method.⁸³ Financial insecurity, previous disadvantages, unemployment, the victim’s social situation, psychological disposition, physical weaknesses, religious beliefs or isolation can all be classified as vulnerabilities susceptible to abuse.⁸⁴

⁷⁹ Kruger & Oosthuizen (2011) *CARSA* 50.

⁸⁰ 50.

⁸¹ Rijken *Trafficking in Persons: Prosecution from a European Perspective* 75.

⁸² UNODC Travaux Préparatoires (official interpretative notes to the Palermo Protocol) 347.

⁸³ Kruger & Oosthuizen (2011) *CARSA* 50.

⁸⁴ 50.

National legislation must therefore incorporate a similarly wide definition of “abuse of a position of vulnerability”.

The giving or receiving of benefits, monetary or other, in order to obtain the consent of an individual that is in power over another in order to facilitate the trafficking of that other individual is a further prohibited method. This would include the bribing of parents, guardians or employers of minors or other vulnerable persons such as women, employees or children to traffic these persons. Benefits are not defined and, as such, not limited in any way. The obligation is therefore to criminalise receiving or giving of any type of benefit.

The Palermo Protocol specifically excludes the means element in totality as a requirement for the crime of trafficking where the victim is a child.⁸⁵ Where the victim of the trafficking is a child, only two elements need to exist to constitute the offence: the prohibited action and the purpose of exploitation. The consequences of this provision are that the conduct that must be criminalised as trafficking of a minor represents a greatly broader category of conduct. This renders the evidentiary burden to prove trafficking significantly lower where the victim is a child.⁸⁶ South Africa has the obligation to ensure that the prohibited means element is not a requirement to constitute the crime of trafficking of a child.

2.1.2.2.1.5. **The element of exploitation**

The element of exploitation is not defined in the Protocol.⁸⁷ This definition has been left almost entirely up to the domestic legislatures of contracting parties. A minimum standard of what is to be included under the broader umbrella of “exploitation”, to be further defined by each state as they choose should they so choose, is encapsulated in the part of the trafficking definition in article 3 that reads:

“Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”

By using the words “shall include”, other forms of exploitation are not excluded. The minimum obligation that South Africa has in terms of enacting legislation in prevention, suppression and punishing of trafficking is to include the criminalisation of acts that are performed (meeting the means and methods elements requirements) with the purpose of exploitation that includes the above, broadly speaking, three exploitative purposes: exploitation of a sexual nature, of a

⁸⁵ Article 3 of the Palermo Protocol; Kruger & Oosthuizen (2011) CARSA 48.

⁸⁶ AT Gallagher *The International Law of Human Trafficking* (2010) 29.

⁸⁷ Kruger & Oosthuizen (2011) CARSA 50.

labour- and slavery-related nature and with regards to the removal of organs, without limiting the possibility of other forms of exploitation. When considering South Africa's broader obligation to prevent, suppress and combat trafficking of persons nationally and transnationally, merely sticking to the "at a minimum" list provided by the Palermo Protocol in the domestic legislation, will not necessarily lead to South Africa meeting the international obligation. As per the laws of interpretation, the ordinary meaning of the word shall be ascribed to "exploitation" in interpreting the word. This word is defined by the Oxford dictionary as:

*"The action or fact of treating someone unfairly in order to benefit from their work."*⁸⁸

In combination with the minimum listed exploitative practices, South Africa will be in breach of its international obligations if it does not provide that "exploitation" will at least mean the same as the above ordinary definition of the word. As such, it is advisable to follow the protocol by providing a list of practices that exploitation includes, but is not limited to. In crafting this list, it will further be advisable to purposefully consider the specific South African context in order to decide whether it is necessary, for the benefit of legal certainty, to expand the list with specific practices that are prevalent in the South African jurisdiction. This would entail the legislature taking cognisance of the obvious as well as not so obvious purposes for which victims are trafficked in order to draft legislation that empowers and enables the judicial hand to effectively prosecute trafficking, in combating thereof.

South Africa might therefore not meet its international obligation if it were to provide a definition for "exploitation" that limits the scope of its applicability to less than the scenarios provided for in the Palermo Protocol.

2.1.2.2.1.5.1. The extension of trafficking offences beyond the scope of a sexual nature

Although slavery of all kinds has existed since the beginning of man, the focus of international legislation in combating crimes of trafficking prior to the Palermo Protocol were centred on providing for the criminalisation of crimes that had sexual exploitation as focus point. The five international instruments that constituted the international legal anti-trafficking framework prior to the Palermo Protocol was the International Agreement for the Suppression of White Slave Traffic,⁸⁹ the Convention on the Suppression of Traffic in Women and Children,⁹⁰ the

⁸⁸ Oxford living dictionaries <<https://en.oxforddictionaries.com/definition/exploitation>> (accessed 23 November 2018).

⁸⁹ The International Agreement for the Suppression of White Slave Traffic of 18 May 1904.

⁹⁰ The International Convention for the Suppression of Traffic in Women and Children of 30 September 1921.

International Convention of the Suppression of the Traffic in Women of Full Age,⁹¹ and the Convention of the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others.⁹² The scope of these five instruments was limited to the “enticing or abducting” of women for purposes of prostitution abroad.⁹³ These instruments also did not establish a definition of human trafficking.⁹⁴ Kelly Hyland lauds the Palermo Protocol for addressing many of the shortcomings of the previous trafficking framework.⁹⁵ Hyland compliments the Palermo Protocol in that it caters more accurately for the modern manifestations of trafficking by not limiting the trafficking offence to activities that have a sexual exploitation purpose.⁹⁶ By providing a broad definition of trafficking in persons, the first hurdle is overcome. By further sculpting the term “exploitation” to include, over and above the exploitation of persons for prostitution, “*other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs*”⁹⁷ the criminalised acts of trafficking better represent the modern crime of trafficking. As such, forced labour in all spheres, not only in the sex work realm, is prohibited. Sweatshops, forced marriage, domestic servitude, begging, involuntary removal of organs, illegal adoptions and forced military service are all practices that can now be prosecuted under the Palermo Protocol.⁹⁸ The Protocol further broadens the scope of prosecutable trafficking by not limiting the acts to offences against women or persons of a specific race.⁹⁹

The Palermo Protocol does not define each form of exploitation included in the definition.¹⁰⁰ To meet the obligation of criminalisation, a member state must therefore ensure that provision is made for prosecution of all forms of exploitation, not only those of a sexual nature, towards all persons, men, women and children regardless of race, age, or nationality.¹⁰¹

⁹¹ The International Convention for the Suppression of the Traffic in Women of Full Age of 11 October 1933.

⁹² The Convention of the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others of 21 March 1950.

⁹³ KE Hyland *The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* Human Rights Brief (2001) 8(2) 31.

⁹⁴ 31.

⁹⁵ 31, 38.

⁹⁶ 31.

⁹⁷ Article 3 of the Palermo Protocol.

⁹⁸ Kruger & Oosthuizen (2011) CARSA 51-55; Hyland (2001) Human Rights Brief 31.

⁹⁹ UNODC Legislative Guides (2004) 258.

¹⁰⁰ Kruger & Oosthuizen (2011) CARSA 51. However, examples of definitions of the minimum forms of exploitation listed in the definition are provided in the Model Law.

¹⁰¹ Kruger *Combating Human Trafficking* 250; UNODC Legislative Guides (2004) 258.

2.1.2.2.1.6. **Ancillary crimes**

Article 5(2)(a) to (c) of the Palermo Protocol require criminalisation of the attempt, participation as accomplice in and organising or directing other persons to commit the crime of trafficking in persons as defined in article 5(1) of the Palermo Protocol. The Model Law clarifies that these crimes do not have to be provided in the member state's domestic trafficking legislation if it is not already provided for under the law of the country.

2.1.2.2.1.7. **Sanctions**

In order to have the required preventative effect, states must adequately sanction the commission of trafficking and related offences. Although the Palermo Protocol itself does not provide specific guidelines in respect of sanctions and sentencing of trafficking offences, article 11 and article 2(b) of the Convention regulate the imposition of appropriate sanctions. Article 2(b) instructs that the penalty for serious crimes shall be at least four years of deprivation of liberty or a more serious penalty. In the context of sentencing, the Model Law views trafficking in persons as a "serious crime" that warrants punishment as referred to in in section 2(b) of the Convention and, in fact, requires that states should, as a minimum, provide for sanctioning in accordance with section 2(b) of the Convention.¹⁰² The South African prescribed punishments should, therefore, reflect the view that the crime is serious. As such, a minimum of four years imprisonment or other form of deprivation of liberty must be provided for in the South African sanctioning regime with the discretion to provide for more serious sanctions for more serious crimes.¹⁰³ Article 11(1) of the Convention provides that states are to render offenders liable to sanctions that take into account the "gravity of the offence" in cases of participation in organised criminal groups (article 5), money laundering (article 6), corruption (article 8) and obstruction of justice (article 23). As the Convention's provisions apply *mutatis mutandis* to the Palermo Protocol, this provision also applies to the imposition of trafficking sanctions required by the Protocol.¹⁰⁴ The UNODC Legislative Guides also affirms that the grave nature of the offence as well as the need to deter these offences must be taken into account in decisions regarding punishment. Although article 11(6) of the Convention confirms that states' national legislation remains the primary source of factors to be taken into account in sentencing proceedings, the UNODC Legislative Guides clarifies that states are obligated to ensure that the gravity of the offence match the sanction imposed, even when mitigating, or aggravating, factors are at play.¹⁰⁵ Article 10(4) of the Convention further requires member states to provide "effective,

¹⁰² Article 8(1) of the Model Law 27.

¹⁰³ Paragraph 280 of the Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime 84.

¹⁰⁴ Article 1(2) of the Palermo Protocol.

¹⁰⁵ Article 1(310) of the Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime 92.

proportionate and dissuasive criminal or non-criminal sanctions” where the offender is a juristic person.¹⁰⁶ In fulfilment of its obligations imposed by article 11 of the Palermo Protocol, party states are not *per se* required to provide penalties for commercial carriers that do not ascertain whether or not persons transported by them have travel documentation in their possession. The Model Law indicates that each party has the unlimited discretion whether or not to impose sanctions for this offence as included in their domestic law in adherence to article 11 of the Protocol.¹⁰⁷ Where fines are provided for in the domestic legislation, the Model Law suggests that states avoid setting fixed monetary amounts for such fines so that the effect of inflation shall not render the fines without the necessary deterrent effect.¹⁰⁸

The international law framework further provides for sanctions in the form of compensation or restitution of trafficking victims. Article 6(6) of the Palermo Protocol obligates state parties to include measures for victims of trafficking to be compensated for damages that they have suffered. This is a peremptory provision that is also required by article 25, paragraph 2 of the Convention. In the discussion of this provision, the Model Law clarifies that this need not be specifically included in the trafficking legislation that member states are to enact if the state’s national legislation already provides for such victim compensation.¹⁰⁹ Member states are not required to provide specific aggravating factors to be considered in sentencing proceedings. The Model Law contains a section thereon as an optional provision that states can include if it conforms to that state’s domestic law.¹¹⁰

The national legislation must, at a minimum, provide for sanctions of four years deprivation of liberty in cases of trafficking in persons and the related crimes that are of a similarly serious nature. Member states are further required to provide for sanctions that concur with the gravity of the offence and the need to deter these crimes. It is almost certain, that in most instances, four years of imprisonment will not suffice to meet the latter obligation and will states as necessity need to impose stricter sentences.

2.1.2.2.1.8. **Conclusion – obligation to criminalise**

It is clear to see that the definition of the crime of “trafficking in persons” under the Palermo Protocol has been constructed in very broad terms to fulfil two important purposes:

1. to ensure the widest possible mandate be granted to member states to effectively and relevantly craft its own national legislation, without fear of limitation, with which to

¹⁰⁶ Article 10(4) of the Convention.

¹⁰⁷ Article 17 of the Model Law 39.

¹⁰⁸ Commentary to Article 8(1) of the Model Law 27.

¹⁰⁹ Article 28 of the Model Law 53.

¹¹⁰ Article 9 of the Model Law 31.

prevent and combat the offence of trafficking as it prevails in its specific jurisdiction;
and

2. to ensure provision for the broadest criminalisation of any and all possible or potential forms of trafficking in persons, existing and future, internationally, cross-border and locally.

South Africa's obligation, accordingly, is to promulgate legislation that matches the requirement of broad criminalisation by inclusion of the three elements of the crime: the prohibited actions, prohibited means and the element of exploitation in a broad format.

2.1.2.2.2. **Obligation to protect and assist victims**

Part II of the Palermo Protocol imputes to ratifying member states the obligation to provide provisions that ensure the protection and assistance of victims of trafficking in persons. Articles 6 to 8 of the Protocol set out the ambit of this requirement specifically in respect of trafficking victims. A range of actions are mentioned in these sections, some of which are not mandatory. The UNODC Legislative Guides state that the Convention and Palermo Protocol do not propose to provide a comprehensive framework to prevent and assist victims of trafficking but that the intention is rather to supplement the already existing general rules regarding the treatment of victim and other witnesses.¹¹¹ The Palermo Protocol provides further provisions specific to trafficking cases. From the literature, it is clear that the approach taken in protection and assistances of victims must be a rights-based approach informed by the primacy of human rights.¹¹² The United Nations High Commissioner for Human Rights established the Recommended Principles and Guidelines on Human Rights and Human Trafficking ("HCHR Guide") to further assist ratifying states in implementing the Convention and Palermo Protocol.¹¹³ The first principle of the HCHR Guide elevates the human rights of victims of trafficking. This principle reads:

*"The human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims"*¹¹⁴

¹¹¹ Part II, chapter 2 of the UNODC Legislative Guides (2004) 283; Kruger *Combating Human Trafficking* 362.

¹¹² Kruger *Combating Human Trafficking* 360.

¹¹³ United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking (2002); Kruger *Combating Human Trafficking* 360.

¹¹⁴ OHCHR (2002) Principle 1 3; SA Law Reform Commission *Project 131 Trafficking in Persons Report* 7.

South Africa, therefore, has the international obligation to protect the human rights of trafficked persons. The relevant sections of part II of the Palermo Protocol in respect of victim protection and assistance in the light of the obligation to criminalise and where these have bearing on the criminal procedure are considered below.

Paragraph 1 and 2 of article 6 of the Protocol require states to afford victims certain procedural rights in the event of court proceedings. For the purpose of protecting the victim's privacy and identity, paragraph 1 determines that legal proceedings are to be confidential, yet, subjects this protective measure to two subjective conditions. A state is only required to protect the privacy and identity of the trafficking victim in appropriate cases and only to the extent that it is possible under the state's own domestic law. As such, generally, non-compliance with this provision is justifiable if the two conditions exist in a particular case. In South Africa's case, existing criminal procedural law provides for *in camera* proceedings in certain circumstances.¹¹⁵ Section 153(1), (2) and (3) of the Criminal Procedure Act, Act 51 of 1977 ("CPA") provide different instances and ways in which South African courts have the powers to protect the privacy and identity of a victim. It can safely be submitted that South African law provides for confidentially held hearings. South Africa's obligation in this regard would merely be to ensure that the Trafficking Act promulgated does not provide to the contrary but rather in support of these provisions. Although not obligatory, it would be advisable to provide for these procedural rights to victims in the Trafficking Act to have one comprehensive legal framework of the matter.

Paragraph 2 of article 6, however, provides that the domestic legislation shall provide for the provision of information in respect of the court proceedings as well as for the provision of assistance to the victim of the offence. The South African Constitution as well as the CPA, provide comprehensively for the provision of information and legal assistance to accused.¹¹⁶ Section 191A of the CPA provides that the Minister may issue regulations affording witnesses certain services. Such regulations have not yet been effected. South Africa will have to ensure its domestic legislation provide these rights to victims, both those that will be acting as witnesses in a trafficking case and those that will not but wish to convey their views and concerns at different stages of the proceedings. It should also be noted that the victim's "views and concerns" might not be relevant only in the context of witnessing. As such, a broad provision for assistance to the victim is required. Paragraph 6 of article 3 requires party states to ensure that its legal system provide recourse to damages suffered by victims of trafficking.

The remainder of article 6 suggests that states are to impute further rights to victims such as rights to housing, information, psychological, physical, and material assistance, employment, educational and training assistance, taking into consideration factors such as age, gender and

¹¹⁵ Section 153 of the Criminal Procedure Act, Act 51 of 1977 ("CPA").

¹¹⁶ Section 73 and 74 of the CPA.

the special needs of the victim. The wording of this section is peremptory yet it only requires states to consider the implementation of measures affording these rights.

Article 8 deals with the repatriation of victims to their country of nationality or permanent residence. Separate laws exist in this context. A member state will be obliged to address aspects pertaining to the right to be issued with new travel identification and travel documents, in the case of confiscation of such by an offender, and to safely be repatriated. In order to comply with this obligation, the domestic legislation will have to provide for a correlation between possible laws in respect of, especially, deportation of foreigners, with trafficking laws. In order to comply with the substantial part of article 8, a member state wishing to deport an individual, must be capable of establishing whether such person is a victim of trafficking. In fact, the wording of the Protocol infers such ability. The implication of this is that the domestic legislation providing for the identification of a trafficking victim will have to trump domestic legislation providing for immediate deportation of illegal foreigners. South Africa will be required to address the co-working or sub-ordination of deportation laws toward the laws promulgated in protection of trafficking victims.

The international requirement will be met by South Africa if its laws contain the general international rules of victim and other witness protection and assistance as well as the rules specified in terms of trafficking victims and witnesses as set out in the Palermo Protocol, read with the Convention.

2.1.2.2.3. Prevention, cooperation and other measures to be implemented

Part III of the Palermo Protocol places an obligation on member states to implement policies and other measures, over and above the criminalising legislation to be promulgated in terms of article 5, to prevent trafficking in persons, in its own jurisdiction and in cooperation with other states. These matters are preventative in nature. Article 9 of the Protocol prescribes that parties shall establish policies, programmes and other measures to both prevent and combat trafficking and to protect and assist victims from re-victimisation. Internally article 9 requests parties to implement public awareness measures in prevention of this crime. Article 9 further also mandates bilateral and multilateral cooperation between states to minimise the factors that render victims vulnerable to exploitation by way of trafficking. Article 10 obligates states to cooperate with each other by the exchanging of information in relation to the documents and routes that perpetrators and victims have used in crossing borders into that state for purposes of identifying offenders, victims and to prevent the same from happening in future. Article 10 also obliges states to subject law enforcement and immigration officials to training in prevention, prosecution and the rights of victims in cases of trafficking. Article 11 prescribes certain border control measures that states are required to implement. Article 11(2) require of states to place an obligation upon commercial transporters of persons. Article 11(2) requires member states to:

“adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of offences established in accordance with article 5 of this Protocol”¹¹⁷

Article 11(3) then continues to specify at least one measure that should form part of the measures a state is to adopt by stating:

“such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.”¹¹⁸

As such, a state is required to impute an obligation on commercial carriers, such as airlines, train operators, bus companies, boat travelling companies or couriers of other sorts, to check that all passengers are in possession of travel documents for the travel they are embarking on. Article 11(4) further determines that sanctions are to be provided for and imposed in case a breach of this obligation in terms of article 11(3). South Africa will therefore have to ensure such an obligation is created, implemented and controlled in order to meet its own international obligation in this regard. The Model Law indicates a provision in a state's domestic law in this regard as optional as it is of the opinion that there are many ways to provide for this obligation on commercial carriers. By law, is only one such way.¹¹⁹ Article 12 requires states to implement measures that ensure the quality of identification and travel documents issued by the country so that they cannot readily be misused or falsified as part of the trafficking process. Measures to prevent the unlawful creation of these documents must also be put in place. Article 13 of the Protocol obliges party states to cooperate with each other in the verification of the validity of travel and identity documents. Many of these obligations pertain to immigration matters that will most probably be dealt with in that sphere where as some could be included in the national criminalisation provisions, depending on the existing legal framework of the member state. Member states are to criminalise the relevant related crimes.¹²⁰

The Palermo Protocol does not address the matters of extraterritorial jurisdiction or confiscation of the proceeds of crime or the equipment and instrumentalities used in the performance of the

¹¹⁷ Article 11(2) of the Palermo Protocol. The Model Law defines “commercial carrier” as a legal or a natural person who engages in the transportation of goods or people for commercial gain.

¹¹⁸ Article 11(3) of the Palermo Protocol

¹¹⁹ Article 17 of the Model Law.

¹²⁰ Kruger & Oosthuizen *South Africa - Safe Haven for Human Traffickers? Employing the Arsenal of Existing Law to Combat Human Trafficking* (2012) (15)1 PER / PELJ 323.

crimes. As such, the minimum requirements set out by the Convention will be those which party states are obliged to conform.¹²¹

2.2. Conclusion

South Africa is obligated to do its part in the combat and prevention of trafficking in persons within its jurisdiction as well as in cooperation with other member states. Trafficking is rife and trafficking targets the vulnerable.¹²² Due to various socio-economic, geographic, political, historic, cultural and moral vulnerabilities, South Africa has regrettably emerged as a source, transit and transport hub of the trafficking industry. South Africa has a long route to pave in order to effectively combat and, later, prevent the prevalence of trafficking within its jurisdiction. However, the most foundational and comprehensive part of South Africa's international obligation is to promulgate legislation that provides for the criminalisation of the trafficking offence as defined in article 3 of the Palermo Protocol as well as certain related crimes.¹²³ The domestic legislation must provide a definition that satisfies the elements of the article 3 definition: prohibiting the required actions of recruitment, transportation, transfer, harbouring and receipt of persons when they are committed by the prohibited means for the purpose of exploitation. South Africa is to ensure that it provides for these terms in a broad interpretation, yet also providing a sufficiently accurate definition to combat any specific forms of trafficking that occurs in its jurisdiction. This can be achieved by remaining true to the Protocol's wide definition of the terms and including specific forms of actions, methods or exploitative practices in the same definition by use of the wording "shall include but not be limited to". South Africa is also to ensure that the definition it promulgates does not only provide for trafficking with a purpose of sexual exploitation. It is to provide for any and all exploitative practices to meet the exploitation element. Over and above the criminalisation of the trafficking offence, related offences are also to be criminalised.¹²⁴ South Africa must also ensure the required measures to protect and assist victims, specifically within the context of the criminal procedure are provided, with specific reference to the protection of victims' constitutionally enshrined right to privacy and access to courts. Lastly, South Africa is also to broaden its approach to the trafficking crime to constitute more than action that merely constitutes a response to the committed crime. South Africa must implement measures, legislative and others, to act in aversion and deterrence of the commission of the crime, in prevention of trafficking of persons. In this regard, it must also provide processes to cooperate with other states.

¹²¹ See the discussion in 2.1.1.3.1 and 2.1.1.3.2 above.

¹²² Kruger & Oosthuizen (2011) *CARSA* 50.

¹²³ Kruger & Oosthuizen (2012) *PER/PELJ* 323.

¹²⁴ Article 5(2)(a), (b) and (c) of the Palermo Protocol; Kruger & Oosthuizen (2012) *PER/PELJ* 323.

In accordance with section 9 of the Constitution, South Africa's legislation must ensure that trafficking in respect of all individuals, irrespective of factors such as gender, race or nationality, are afforded the same rights, recourse and protection. The definition promulgated by the South African legislature will not suffice if it limits trafficking as a crime that is committed against women and children only, but will need to provide for the prevention and combat of trafficking of all persons, especially women and children.

For South Africa to meet its international requirements as set out in the Convention and Palermo Protocol, the Trafficking Act is to meet the requirements as set out in this chapter, the predominant thereof being, the criminalisation of the offence of trafficking in persons as defined in article 3(1) of the Protocol, whilst also providing legislative or other measures to protect and assist victims as well as in prevention of the ever prevailing crime of trafficking.

3. The required *mens rea* under the Palermo Protocol

This chapter considers what forms of *mens rea* are prescribed by the international law as sufficient to prosecute the crime of trafficking in persons. An analysis of the forms of *mens rea* will assist in establishing whether, apart from intent, negligence and other derivative forms of liability are prescribed, or if not, allowed.

Article 5(1) of the Palermo Protocol requires criminalisation on the following grounds:

“Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.”

By use of the words “for the purpose of exploitation” in the article 3(a) definition of trafficking in persons, the Palermo Protocol imports a high standard of criminal intent as element of the prescribed international definition.¹²⁵ By this, the Palermo Protocol requires member states to, at a minimum, ensure that trafficking acts performed by a person with the intent to exploit a victim is criminalised by its anti-trafficking legislation. The required form of *mens rea* is referred to by the UN.GIFT’s manual on human trafficking as *dolus specialis*.¹²⁶ *Dolus specialis* is defined as the purpose aimed at by the offender whilst committing the material acts of the offence.¹²⁷ *Dolus directus*, being the intent to commit an act to achieve a specific purpose, qualifies as a form of *dolus specialis*.¹²⁸ Scholars also argue that *dolus specialis* would in certain circumstances include *dolus indirectus* and *dolus eventualis*.¹²⁹ The international definition errs on the side of caution by only requiring that the highest form of criminal intent (specifically, the intent to exploit a person/s) must, at a minimum, be included as element of each member state’s trafficking definition. In light of the fragmented nature of the trafficking process and the fact that many role players are generally involved in the trafficking of any victim, it is submitted that the required standard of intent could prove difficult to establish.¹³⁰ However, the Palermo Protocol

¹²⁵ Article 3(a) of the Palermo Protocol.

¹²⁶ UN.GIFT Anti-human Trafficking Manual for Criminal Justice Practitioners (2009) 5. The writer of *Dolus Specialis: The International Criminal Tribunals’ Interpretations of Genocidal Intent* (2010) submits that *dolus specialis* can be found in all three forms: *dolus directus*, *dolus indirectus* and *dolus eventualis*. For a thorough discussion of the application of *dolus specialis* by international tribunals in respect of genocide see the aforementioned article by DL Burns.

¹²⁷ DL Burns *The International Criminal Tribunals’ Interpretations of Genocidal Intent* BHonors School of International Service American University (2010) 15.

¹²⁸ 15.

¹²⁹ 13.

¹³⁰ D Demetriou *The Mens Rea of Human Trafficking: The Case of Migrant Domestic Workers* (2018) ICJR (abstract).

does not preclude state parties from providing forms of *mens rea* at a lower standard.¹³¹ Negligence, recklessness, “wilful blindness” or presumptions of intent are all derivative forms of fault that can be incorporated by parties in crafting their local definition within their own legislative context.¹³² The required form of *mens rea* would also be applicable in cases of attempted trafficking and cases against accomplices or persons that organise or direct others to traffic victims.¹³³ As such, the international requirement in respect of the required *mens rea* is broad and open-ended – state parties are only obligated to ensure intentional trafficking is criminalised, but have the right to provide that negligent or other lesser forms of *mens rea* also be prohibited. South Africa, will therefore satisfy its international obligation if the Trafficking Act prescribes the intentional trafficking of persons.

¹³¹ UN.GIFT Anti-human Trafficking Manual for Criminal Justice Practitioners (2009) 6; UNODC Legislative Guides (2004) 25-26; Kruger *Combating Human Trafficking* 316.

¹³² UN.GIFT Anti-human Trafficking Manual for Criminal Justice Practitioners (2009) 6. Article 34(3) of the Convention.

¹³³ Article 5(1) read with article 3 of the Palermo Protocol.

4. The South African legal framework prior to commencement of the Trafficking Act

4.1. Introduction

The offence of trafficking is known for its complex and multi-faceted nature. It is generally referred to as a criminal process consisting of a collection of crimes rather than a criminal event.¹³⁴ Prior to enactment of the Trafficking Act, South Africa effectively prosecuted forms of trafficking in a number of successful cases by utilising the existing common law and statutory crimes.¹³⁵ Prosecution in this manner reverts to the prosecution of the elements of the trafficking process in an unbundled, fragmented sense by addressing the underlying crimes that form a trafficking chain. Although effective in many instances, the lack of an adequate all-encompassing defined trafficking in persons crime, leaves the prosecuting authorities with only this option. The workload and evidentiary burden in order to secure a conviction is increased gravely. Instead of having to prove the elements of one crime (trafficking in persons), the elements of more than one underlying crime might need to be proved to ensure that the purposes of justice are achieved. Similarly, intent to commit each of the common law or statutory underlying crimes will need to be established, instead of merely the intent to traffic individual/s. This might prove a task harder than it appears, as each of these crimes that are fragments of the trafficking process is often committed by different persons. It is imperative that one complete definition of trafficking in persons be crafted and criminalised in order to most succinctly combat and prevent this crime. Nonetheless, the utilisation of the fragmented common law and statutory crimes cast the net employed to catch the diverse and ever-developing array of trafficking activities wider and increase the preventative tools of the prosecution. This chapter seeks to set out the relevant South African law principles and legislation applicable to acts of trafficking in persons prior to commencement of the Act and their consequent role in the prosecution of this crime. In-depth analysis of these principles has been done by South African scholars, such as Kruger and Oosthuizen. This chapter will consider this analysis in the context of the newly-promulgated Trafficking Act to establish how the relevant common law crimes and principles as

¹³⁴ UNODC Toolkit (2008); K Bales *Understanding Global Slavery* (2005) 133; Kruger *Combating Human Trafficking* 418; Kruger & Oosthuizen (2012) *PERJ/PELJ* 1; Obokata (2006) *Netherlands Quarterly of Human Rights* 380.

¹³⁵ *S v Sawatkan* unreported case number: 41/2045/08, Durban in which the accused was convicted in terms of the Sexual Offences Act 23 of 1957; *S v Wiphatawaithaya* unreported case number: 317/2/09, Durban in which the accused was also convicted in terms of the Sexual Offences Act 23 of 1957; *S v Eloff* unreported case number: SH599/08 Welkom in which case the accused was convicted in terms of the Sexual Offences Amendment Act 32 of 2007; *S v Amien Andrews* and *S v Elizabeth Maswanganye*, as referred to in the SA Law Reform Commission *Project 131 Trafficking in Persons Report* (2008) 4.

well as the relevant statutory instruments by which trafficking in persons have been prosecuted can still be applied (post commencement of the Trafficking Act) in combat of trafficking. Although a complete definition now exists in the South African legal framework, the scope, power and efficiency of each of these principles and statutes will be determined to consider the possibility and need of still utilising them in the prosecution of this process-based crime. Kruger emphasises that these crimes remain part of the “arsenal of related crimes that may be used to prosecute traffickers for crimes other than human trafficking” and “that such crimes remain a component in the South African legal response for combating human trafficking”.¹³⁶

4.2. Common law crimes

The South African Law Reform Commission’s (“SALRC”) 2008 report on trafficking in persons suggests that the South African common law present many crimes that can be used to bring trafficking offenders to the book, although no single crime of trafficking in persons exist.¹³⁷ These and other common law crimes will be considered below.

4.2.1. Common assault

Burchell defines assault as the infringement of the bodily integrity by either the direct application of physical force or by creating the belief that force will be applied to the victim.¹³⁸ In the context of trafficking, assault, directly and, possibly even more so, indirectly, is generally applied by traffickers to gain control over their victims.¹³⁹ One of the exploitative purposes for which victims are trafficked and one of the manners by which traffickers obtain and enforce control over their victims, is assault. Offenders regularly subject victims to forced drug and or alcohol addiction in order to render them dependent on their controllers. The purposes for which persons are trafficked regularly also entail assault, especially of a sexual nature. The common law offence of assault can adequately be utilised as substitute in prosecuting acts or omissions that equate to both the elements of prohibited activity and prohibited manner in a trafficking process that show difficulty to prove in its entirety.

Burchell writes that perpetrators can be convicted of assault where they wrongfully and intentionally use their body or an instrument to apply force to a victim’s person.¹⁴⁰ The required intention under the new trafficking in persons crime differs from the intention necessary to constitute assault. Prosecutors that find difficulty in proving the intention to subject a victim to

¹³⁶ Kruger *Combating Human Trafficking* 418.

¹³⁷ SA Law Reform Commission *Project 131 Trafficking in Persons Report* 12; Kruger & Oosthuizen (2012) *PER/PELJ* 285.

¹³⁸ Burchell *Principles of Criminal Law* 5 ed (2016) 591.

¹³⁹ SA Law Reform Commission *Project 131 Trafficking in Persons Report* 15.

¹⁴⁰ Burchell *Principles of Criminal Law* 5 ed 595-596.

the full trafficking process due to lack of evidence to that effect can possibly prove the intention to, only, assault a victim at a lower evidentiary burden. In other words, by way of example, the intent to assault the victim, in order to transport them for the purpose of sexual exploitation, should be proven at a lower, or different, evidentiary burden than the intention to commit all three elements of trafficking in persons. This can be especially helpful in cases where the person orchestrating the trafficking is not involved in the execution of the process and one of the individuals that bear no further knowledge as to the purpose why he is instructed to, for example, assault and abduct an individual, can still be brought to book for that crime. In light thereof that organised crime syndicates have been noted to coordinate trafficking activities in South Africa,¹⁴¹ the additional tools provided for the prosecution under the common law crimes, will assist in combating this phenomenon of trafficking, and should be retained as part of law enforcement strategies to combat trafficking.

4.2.2. Assault with intention to do grievous bodily harm

This common law crime resembles the offence of assault but is distinct in that it requires the specific intent to cause grievous bodily harm.¹⁴² Some factors that will be taken into account in determining whether the assault is mere common assault or assault with the intention to do grievous bodily harm are, for example, the type of weapon used, the extent of the violence, the nature of the injuries inflicted, the relationship between the aggressor and victim, whether the aggressor is extorting any vulnerabilities of the victim and the body parts targeted.¹⁴³ Kruger refers to the fact that traffickers generally apply serious, continuous assaults to their victims in order to maintain their controlling hold.¹⁴⁴ Another tactic employed by traffickers to prohibit their victims from conduct that is contrary to their commands or attempts to escape, is to impute fear to their victims by threats of serious bodily harm. In order to secure conviction of this crime, actual harm is not required. The intention to cause such harm is sufficient.¹⁴⁵ Therefore, this offence can be used in effective prosecution of instances where victims are threatened with serious injury but only slight or no harm is actually effected.¹⁴⁶

¹⁴¹ Kruger *Combating Human Trafficking* 409.

¹⁴² Burchell *Principles of Criminal Law* 5 ed 599-601.

¹⁴³ 600-601.

¹⁴⁴ Kruger *Combating Human Trafficking* 426.

¹⁴⁵ Burchell *Principles of Criminal Law* 5 ed 690.

¹⁴⁶ SA Law Reform Commission Project 131 *Trafficking in Persons Reports* 14-16; Kruger *Combating Human Trafficking* 426.

4.2.3. Abduction

Burchell defines the crime as the unlawful taking of a minor from the control of a custodian with the intention of enabling someone to marry or have sexual intercourse with that minor¹⁴⁷. In terms of this offence, the actual commission of sexual intercourse or marriage need not have taken place or be proven to secure a conviction. Only the intention to marry or have sexual intercourse is required. The intention need not be that the perpetrator marries or have sexual relations with the abducted minor. As such, the minor can be abducted for marriage or intercourse with someone else. This crime can, therefore, be of assistance in prosecution of individuals that facilitate this part of the trafficking process where the full trafficking crime may not be capable of successful prosecution.

Specific to the South African context, is the customary traditions of *ukuthwala*. The concept of *ukuthwala* and its legality have become a subject of controversy in South African legal and cultural spheres in recent times, especially against the background of the war on human trafficking and more specifically after a contentious judgement in *Jezile v S* (“*Jezile*”).¹⁴⁸ *Ukuthwala* is a custom exercised by some indigenous communities of South Africa. *Ukuthwala* entails the “mock abduction” of an unmarried woman by her “groom to be” and his family. The tradition holds that the woman will pretend to protest her abduction in order to appear to protect her dignity. Once at her suitor’s premises, she is to be kept with the women of the house whilst the groom conducts marriage negotiations with the *thwala*-ed woman’s family.¹⁴⁹ The suitor is not to have intercourse with the woman at this stage.¹⁵⁰ Customary law scholars argue that *ukuthwala* is a legitimate customary practice with the purpose being the negotiation of the terms of a customary law marriage and not sexual intercourse.¹⁵¹ However, recent incidences of abuse of this custom have caused the legality of this tradition to come under scrutiny.¹⁵² Although the legality of the *ukuthwala* custom remains under scrutiny, the common law crime of abduction can be utilised in prosecution of cases where women are forced into marriage unwilling or where sexual intercourse is forced under the purports of seemingly legal *ukuthwala*. Where the criteria for valid *ukuthwala* as required under customary law are not present,

¹⁴⁷ Burchell *Principles of Criminal Law* 5 ed 762.

¹⁴⁸ *Jezile v S and Others* 2016 2 SA 62 (WCC).

¹⁴⁹ Kruger *Combating Human Trafficking* 419-421.

¹⁵⁰ 420.

¹⁵¹ 420.

¹⁵² E Thornberry “*Ukuthwala*”: *Even living custom must be developed to comply with Constitution* <<http://www.customcontested.co.za/ukuthwala-even-living-custom-must-be-developed-to-comply-with-constitution/>> (accessed 31 January 2019); D Mabasa *Ukuthwala: Is it all culturally relative?* (2015) De Rebus 28.

prosecution can and should be pursued under the ambit of the crime of abduction as was the case in the *Jezile* judgement.¹⁵³

4.2.4. Kidnapping

Burchell defines the common law crime of kidnapping as the unlawful and intentional deprivation of a person of his or her freedom of movement or, if such person is a minor, his or her custodians of their control over such child.¹⁵⁴ The 2008 SA Law Reform Commission report refers to kidnapping as one of the methods used to recruit individuals for purposes of trafficking them.¹⁵⁵ The scholars indicate that kidnapping is not sufficient to deal with human trafficking as trafficking infringes a much wider range of rights than that of kidnapping.¹⁵⁶ While trafficking infringes rights such as the dignity, life and security of the person, kidnapping only addresses the right to freedom of movement.¹⁵⁷ Where prosecution under the auspices of kidnapping can assist prosecutors in combating trafficking is specifically in cases where the evidence does not prove the exploitative purpose element required in securing a conviction of trafficking.¹⁵⁸ Where trafficking requires three elements, the prohibited action, prohibited method and an exploitative purpose for the first two elements, a conviction on a charge of kidnapping can be secured by proving only one of these three elements. Where a kidnapper has deprived a victim of his/her right to freedom without their consent, this will be sufficient to convict the offender of kidnapping. However, although this could be sufficient to constitute the first two elements of the trafficking offence, the further exploitative purpose element will be lacking. In this regard, the lack of evidence to obtain a trafficking conviction can be circumvented by securing a conviction on a kidnapping count.

4.2.5. Murder, attempted murder and culpable homicide

Where the death of a victim is caused unlawfully and intentionally by a trafficker, the trafficker can be convicted of murder.¹⁵⁹ Convictions of attempted murder have also been secured in cases where offenders, knowing that they are HIV positive, have raped victims.¹⁶⁰ This is a

¹⁵³ Kruger *Combating Human Trafficking* 419.

¹⁵⁴ Burchell *Principles of Criminal Law* 5 ed 659.

¹⁵⁵ SA Law Reform Commission *Project 131 Trafficking in Persons Report* 13.

¹⁵⁶ SA Law Reform Commission *Project 131 Trafficking in Persons Report* 12; Kruger *Combating Human Trafficking* 423.

¹⁵⁷ Kruger & Oosthuizen (2012) *PER/PELJ* 288.

¹⁵⁸ Kruger & Oosthuizen (2012) *PER/PELJ* 287; Article 3(a) of the Palermo Protocol; section 4(1) of the Trafficking Act.

¹⁵⁹ Burchell *Principles of Criminal Law* 5 ed 578; *S v Nyalungu* 2005 JOL 13254 (T); Kruger *Combating Human Trafficking* 423; SA Law Reform Commission *Project 131 Trafficking in Persons Report* 16.

¹⁶⁰ SA Law Reform Commission *Project 131 Trafficking in Persons Report* 13.

useful tool to prosecute traffickers or those that make use of their services that sexually penetrate victims of trafficking whilst knowing that they are human immunodeficiency virus (“HIV”) positive. The prosecution would have to prove that the offender knew that he or she was HIV positive and could reasonably or ought reasonably to have foreseen that their victim could be infected with the human immunodeficiency virus due to their actions. It is not necessary that the victim had actually been infected with the virus to prove attempted murder. However, to prove murder, death by acquired immune deficiency syndrome (“AIDS”) which has been caused by the murder accused’s actions of rape, would need to be established.¹⁶¹

Kruger and Oosthuizen state that where a perpetrator’s negligent conduct causes the death of a trafficking victim, that perpetrator can also be brought to book by a charge of culpable homicide.¹⁶²

4.2.6. Extortion

Extortion involves the unlawful intentional application of pressure by which another is induced to grant an advantage, patrimonial or non-patrimonial, to the person applying the pressure.¹⁶³ Traffickers often extort victims in order to secure the victim to a position to exploit them and to maintain such position of exploitation.¹⁶⁴ Burchell confirms that the exploitation obtained by way of extortion can also be of patrimonial as well as non-patrimonial nature.¹⁶⁵ Traffickers use extortion against victims that do not want to wilfully submit to the exploitation envisaged by the trafficker by threatening to retaliate against their family. The SA Law Reform Commission Report also mentions that traffickers which sexually exploit victims, threaten their victims with the publication of pictures or video footage of the victim performing sexual acts.¹⁶⁶ Burchell states that although the mere revelation of embarrassing information would not *per se* be unlawful. Where the purpose of the threat is to induce an undue advantage in favour of the extortioner, such threat becomes unlawful. The revelation of the commission of a crime by a person for the purpose of obtaining such an undue advantage would, therefore, constitute trafficking.¹⁶⁷ Therefore, where a trafficker threatens victims with revealing images of drug usage or prostitution to family members in order to obtain the victim’s submission will be extortion of such victim. However, even if the victim’s conduct might not be illegal but would exact the purposed

¹⁶¹ SA Law Reform Commission *Project 131 Trafficking in Persons Report* 13; Kruger *Combating Human Trafficking* 424.

¹⁶² Kruger *Combating Human Trafficking* 423.

¹⁶³ Burchell *Principles of Criminal Law* 5 ed 736; SA Law Reform Commission *Project 131 Trafficking in Persons Report* 13; Kruger *Combating Human Trafficking* 427.

¹⁶⁴ Kruger *Combating Human Trafficking* 427-428.

¹⁶⁵ Burchell *Principles of Criminal Law* 5 ed 736.

¹⁶⁶ SA Law Reform Commission *Project 131 Trafficking in Persons Report* 14.

¹⁶⁷ Burchell *Principles of Criminal Law* 5 ed 739.

undue influence from that victim, such conduct would constitute prosecutable extortion, such as the revealing of footage or images of sexual acts. The SA Law Reform Commission Report, however, confirms that, as with many of the other common law crimes such as kidnapping, the reach of prosecution cannot extend to crimes of extortion committed outside the South African border.¹⁶⁸ As such, this common law crime can assist prosecution in dealing with offences committed within South Africa. However, the promulgation of counter-trafficking legislation as required by the Palermo Protocol is imperative in combating these types of crimes when committed outside of the borders while still leading to trafficking within the South African borders.¹⁶⁹

4.2.7. Fraud, forgery and uttering

In order to successfully select victims for trafficking, traffickers prey on the most vulnerable of society by the avid use of fraudulent misrepresentation. Kruger rightly points out that the use of deceptive devices is intricately part of the success of trafficking.¹⁷⁰ Traffickers often represent lucrative career opportunities, educational prospects, sports opportunities or other opportunities to a better quality of life to victims in order to obtain their “consent” to either the transport of such victim, in other words the prohibited act of the trafficking definition, or to the exploitive purpose for which the victim is trafficked, being the final element of the Palermo Protocol’s trafficking definition.¹⁷¹ Where prosecutors do not have a case to set out in proving all three elements of trafficking, prosecution of the actions of traffickers that meet the definition of common law fraud is critical. Burchell refers to fraud as being the unlawful making of a misrepresentation, with the intent to defraud, which cause actual prejudice or which has the potential to cause prejudice to another.¹⁷² Therefore, where offenders unlawfully and intentionally misrepresent certain facts to victims in order to obtain their consent to be trafficked or to partake in something in which they would not have done so failing the misrepresentation, this conduct is prosecutable as the common law crime of fraud. Deception and misrepresentation, and not necessarily physical violence, as to employment circumstances such as salary amounts, job description, work circumstances or even the location of the job, often represent the manner by which offenders lure their victims into the claws of trafficking.¹⁷³ However, as fraud is not limited to patrimonial matters, offenders can be brought to book for any type of misrepresentation.¹⁷⁴ A further

¹⁶⁸ SA Law Reform Commission *Project 131 Trafficking in Persons Report* 13.

¹⁶⁹ Kruger *Combating Human Trafficking* 428; SA Law Reform Commission *Project 131 Trafficking in Persons Report* 13.

¹⁷⁰ Kruger *Combating Human Trafficking* 428.

¹⁷¹ For a more detailed discussion of the elements of the offence of trafficking in persons as defined by the Palermo Protocol refer to paragraph 2.1 above. Kruger *Combating Human Trafficking* 178.

¹⁷² Burchell *Principles of Criminal Law* 5 ed 742.

¹⁷³ Kruger *Combating Human Trafficking* 177.

¹⁷⁴ *S v Friedman* 1 1996 1 SACR 181 (W).

important piece in the trafficking process, especially in respect of cross-border trafficking, is the fact that offenders create forged identity documents, passports or other travelling documents, job contracts or international invites in the process of transporting trafficking victims from a source country to a destination or transit country. The offender makes himself guilty of a forgery or uttering and where these documents are presented, for example to border authorities or potential future employers, this constitutes a prosecutable fraudulent misrepresentation.¹⁷⁵ It is submitted that prosecution of these unlawful and intentional misrepresentations as fraud is an exceptionally important weapon in the hands of the prosecution as it enables authorities to secure convictions of at least two of the elements of the Palermo Protocol definition of trafficking in persons without having to prove the full crime. Prosecution of fraud, forgery and uttering are useful tools to prosecute certain components of the trafficking process that are necessary to achieve the completion of the multi-faceted process.

4.2.8. *Crimen iniuria*

Crimen iniuria consists in the unlawful and intentional serious violation of the dignity or privacy of another person.¹⁷⁶ Kruger explains that the rights protected under the crime of *crimen iniuria* are wide and represent opportunity to prevent initial conduct of traffickers in building victims' trust from developing into full scale trafficking.¹⁷⁷ *Crimen iniuria* protects a person's *dignitas*. Although what is generally understood by the term dignity will fall within the ambit of *dignitas*, this term includes both a person's dignity and privacy.¹⁷⁸ It is expected that this crime will be applicable in most cases of trafficking.¹⁷⁹ Trafficking is generally a humiliating and undignified process. Traffickers view victims as assets for commercial use. They infringe upon the dignity and privacy of victims by the use of defamatory language, subjecting victims to racist or sexist commentary and physical abuse. In such cases, conviction on a count of *crimen iniuria* is justified. A victim's bodily and sexual integrity are protected by crimes such as assault, sexual assault or rape. However, where the assault also constitutes a breach of the victim's privacy or dignity, *crimen iniuria* may also be an appropriate charge. Sexual grooming of victims by offenders can conceivably be prosecuted under this crime. Explicit conduct such as unwanted kissing of victims, touching of private parts or forcing victims to watch or partake in sexual activities will also constitute *crimen iniuria* (apart from any applicable statutory forms of sexual assault). Where victims are forced to hand over their cellular phones or where their communications with others are monitored for control or other purposes, this, too, will be a breach of the victim's privacy. In cases where offenders initiate the process of building a victim's

¹⁷⁵ Kruger *Combating Human Trafficking* 178.

¹⁷⁶ Burchell *Principles of Criminal Law* 5 ed 648.

¹⁷⁷ Kruger *Combating Human Trafficking* 429.

¹⁷⁸ 429.

¹⁷⁹ 429.

trust by way of communication through internet chat rooms, social media or verbal talk that constitute conduct that grooms a person for sexual acts or bids sexual indecency, Burchell submits that this too can constitute *crimen iniuria*.¹⁸⁰ This common law crime can be utilised effectively to inhibit these initial stages of modern trafficking before they evolve into the further elements of trafficking. It can further be effective in conveying the full dissatisfaction of the law in respect of trafficking in cases where the facts will lead to a successful conviction of trafficking, or other more serious crimes such as rape or abduction.

4.2.9. Criminal defamation

Criminal defamation protects a person's *fama*. An individual's *fama* represents their good name or reputation. Criminal defamation is, therefore, applicable in cases where an offender unlawfully and intentionally publicises content which will or can seriously harm the reputation or good standing of a person.¹⁸¹ In this context, publication refers to any case where the defamatory information came to the attention of someone other than the victim. In cases where traffickers spread photographs, video or other footage of victims in sexual acts, abusing drugs or as drug mules to their family, friends, previous employers or colleagues, often without disclosing that the victim has been coerced into this conduct, this constitute criminal defamation.¹⁸² Therefore, criminal defamation can also be used as offence in combating trafficking and trafficking-related conduct.

4.2.10. Slavery

The 1926 Slavery Convention defines slavery as:

"the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised".¹⁸³

The question of whether this crime or any other definition of slavery is an offence applicable in the South African jurisdiction to combat trafficking is multi-faceted. The first point of discussion is whether such a crime continues to exist in the South African common law. The SA Law Reform Commission confirms that although slavery is not a crime discussed by criminal law scholars in the same context as the other general abovementioned common law crimes, for example murder, assault or *crimen iniuria*, the crime has not yet become desuetude.¹⁸⁴ South African law determines that a crime can fall into desuetude to the extent that it no longer exists

¹⁸⁰ Burchell *Principles of Criminal Law* 5 ed 655.

¹⁸¹ 655.

¹⁸² Kruger & Oosthuizen (2012) *PER/PELJ* 294.

¹⁸³ Article 1(1) of the Slavery Convention signed at Geneva on 25 September 1926.

¹⁸⁴ SA Law Reform Commission *Project 131 Trafficking in Persons Report* 15.

where either a court or the legislature has determined that the crime has in fact fallen into desuetude.¹⁸⁵ While there have not been recent prosecutions of slavery in South African courts, the SA Law Reform Commission further states that the offence has not yet been declared out of use by a court or the legislature.¹⁸⁶ In further support of the crime of slavery as an offence that forms part of the South African criminal context, is the fact that slavery constitutes an offence under international customary law.¹⁸⁷ By virtue of this legal fact, slavery is a crime under South African law via section 232 of the Constitution, 1996. Furthermore, slavery has been included as part of the international peremptory norms of *ius cogens*. As such, all states may exercise universal jurisdiction to prosecute this international crime, whether it has taken place within their borders or not.¹⁸⁸ Members of the international community can, and could even be obliged, to act against offenders that make themselves guilty of acts of slavery in that such offenders are seen as “enemies of all mankind” (akin to the same characterisation that applies to piracy on the high seas).¹⁸⁹ Modern forms of slavery that are prohibited under domestic and international law include vestiges of the “ancient” or archetypical forms of slavery as still practiced in parts of the world, notably Mauritania and Sudan; trafficking in persons for purposes of forced prostitution; bonded labour; immigrant domestic workers; and forced labour.¹⁹⁰ It falls beyond the scope of this dissertation to consider the scope of the contemporary crime of slavery under customary international law. Suffice to note that, apart from the criminalisation under customary international law, one can also note the normative imperative against forms of slavery mentioned elsewhere in the South African Constitution, notably section 13 that provides that “*no one may be subjected to slavery, servitude or forced labour*”.¹⁹¹ The clear international and domestic (constitutional) norms against slavery strengthens the argument that the crime of slavery is a crime under South African law and as such prosecutable in the criminal courts. Whether it is practical and advisable to pursue the common law route, is perhaps open to debate, but perhaps also a moot point given the statutory developments that form the focus of this dissertation.

Thus, it is submitted that there is comprehensive provision for the crime of slavery in South African law. In principle, it is a prosecutable crime in South Africa and should, in appropriate cases be pursued to ensure convictions of acts of slavery in the combat of human trafficking. However, the fact that slavery in its common law form has not been prosecuted in South Africa

¹⁸⁵ 15.

¹⁸⁶ 15.

¹⁸⁷ Dugard *International Law* 29-33; Kruger & Oosthuizen (2012) *PER/PELJ* 295.

¹⁸⁸ SA Law Reform Commission Project 131 *Trafficking in Persons Report* 13.

¹⁸⁹ Dugard *International Law* 156; Kruger & Oosthuizen (2012) *PER/PELJ* 295; SA Law Reform Commission Project 131 *Trafficking in Persons Report* 14.

¹⁹⁰ Y Rassam “Contemporary forms of slavery and the evolution of the prohibition of slavery and the slave trade under customary international law” 1999 (2) *Virginia Journal of International Law* 303-352.

¹⁹¹ Section 13 of the Constitution.

could result therein that many prosecutors and judicial officers are not acquainted with the crime and, by reason thereof, hesitant to press charges of slavery *per se*. Nonetheless, where it is not possible to prove the elements of trafficking in persons whilst slavery can be evidenced, this crime should be utilised to prosecute acts of slavery that form part of the trafficking of victims.

4.3. Statutory crimes

In addition to the common law crimes, a range of statutory crimes have been promulgated that can also be used in the prosecution of trafficking and related offences. Some of the statutes prohibit crimes that form a part of the trafficking process whereas other pieces of legislation contain clauses providing interim measures to criminalise crimes of human trafficking in the context of the main purpose of that legislation, pending the promulgation of legislation that specifically criminalises trafficking in persons. These crimes and their usefulness in the South African battle against trafficking will be considered below.

4.3.1. Riotous Assemblies Act 17 of 1956

Section 18(1) of the Riotous Assemblies Act 17 of 1956 ("Riotous Assemblies Act") criminalises the attempt to commit any crime with the South African legal context, whether statutory or under common law. It further provides that where no other penalty is provided, a person convicted of attempt to commit a crime will be liable to the punishment of someone that has been convicted of actually committing such crime.¹⁹² In terms of section 18(2) of the Riotous Assemblies Act, conspiracy and incitement to commit any crime in the South African legal context, is criminalised.¹⁹³ The SA Law Reform Commission Report refers to the majority ruling of the Constitutional Court case of *S v Jordan* in which it was held that a client that makes use of the services of a prostitute is guilty of committing the crime of prostitution by reason of section 18(2) of this act as conspirator or accomplice.¹⁹⁴ As such, these provisions can be extremely effective in prosecuting the range of agents involved in the trafficking process.¹⁹⁵ Whereas trafficking involves a number of individuals to facilitate the process of trafficking a victim that could include or be separate from the person who might ultimately make use of the services of the trafficked victim. By utilising the section 18 provisions, the prosecution has the means to act firmly against users of services of traffickers and, so doing, smother the demand in the market. It has been noted that the provisions of the Riotous Assemblies Act do not extend to cover acts of attempt,

¹⁹² Section 18(1) of Riotous Assemblies Act.

¹⁹³ Section 18(2) of Riotous Assemblies Act.

¹⁹⁴ *S v Jordan* 2002 6 SA 642 (CC).

¹⁹⁵ UN.GIFT Workshop 016: *Profiling the Traffickers* (2008) 8.

conspiracy or incitement to commit crimes outside of the South African borders.¹⁹⁶ The provisions lack the full effect as required by the international requirements.

4.3.2. Domestic Violence Act 116 of 1998

The Domestic Violence Act 116 of 1998 ("Domestic Violence Act") provides protection for a "complainant" against acts of domestic violence. A "complainant" is defined as any person who is or has been in a domestic relationship and who is or has been subjected to domestic violence.¹⁹⁷ A child of such complainant is also included in the definition of "complainant".¹⁹⁸ The definition of "domestic relationship" includes a range of situations that could all be prevalent in different trafficking scenarios. The definition of such "domestic relationship" provided in section 1 of this act reads:

"domestic relationship" means a relationship between a complainant and a respondent in any of the following ways:

- a) *they are or were married to each other, including marriage according to any law, custom or religion;*
- b) *they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;*
- c) *they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);*
- d) *they are family members related by consanguinity, affinity or adoption;*
- e) *they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration;*
or
- f) *they share or recently shared the same residence;*¹

Domestic violence is further defined as:

"physical abuse; sexual abuse; emotional, verbal and psychological abuse; economic abuse, intimidation, harassment, stalking, damage to property, entry into the complainant's residence without consent, where the parties do not share the same residence; and any other controlling or abuse behaviour towards a complainant where

¹⁹⁶ N Mollema *Combating Human Trafficking In South Africa: A Comparative Legal Study* LLD thesis UNISA (2013) 444; S v Basson 2000 3 All SA 59 (T) 75.

¹⁹⁷ Section 1 of the Domestic Violence Act.

¹⁹⁸ Section 1 of the Domestic Violence Act.

such conduct harms, or may cause imminent harm, to the safety, health or wellbeing of such complainant".¹⁹⁹

The SA Law Reform Commission refers to two types of domestic relationships, as included in the definition of "domestic relationship" that could be of protective assistance to victims of trafficking. The SA Law Reform Commission report mentions two distinct situations: the situation where a victim and offender lived together in the same residence; and where the victim and the perpetrator were in a romantic relationship.²⁰⁰ The SA Law Reform Commission describes that often a perpetrator would engage one of the victims romantically or cause the victim to believe that she and the perpetrator are in a romantic relationship. The trafficker would then use this relationship to obtain information on the other trafficked victim's so as to preclude potential problems.²⁰¹ In other instances, a romantic relationship would be used by the trafficker to obtain the victim's trust and, later, consent for sexual acts which creates a sense of vulnerability and often leads to further trafficking.²⁰² Although these two are highlighted by the SA Law Reform Commission report, it is submitted that many different trafficking situations would qualify as domestic relationships under this Act. Kruger refers to the situation where family members are trafficked, for example, by parents or other relatives related by consanguinity, affinity or adoption.²⁰³ This could help combat arranged child marriages, including the unlawful application of the *ukuthwala* custom where parents force daughters into marriages, illegal adoptions or child labour by family members. The situation where a victim and the trafficker resides, or previously resided in the same residence, such as a brothel or domestic residence, such relationship will qualify as a "domestic relationship" in terms of which the victim can lay a complaint against the perpetrator where domestic violence took place against such victim.²⁰⁴ Sub-paragraph (c) of the "domestic relationship" definition includes the relationship between individuals that are parents of a child or have or had parental responsibilities over a child. This could include situations where a trafficked victim was forced to have sexual relations which led to the birth of a child, intended or not. Where women are trafficked with the purpose of producing children for organ harvesting, child soldiers, child labourers or illegal adoption, the Domestic Violence Act could be of assistance to such women and their children.

¹⁹⁹ Section 1 of the Domestic Violence Act.

²⁰⁰ SA Law Reform Commission *Project 131 Trafficking in Persons Report* 16; paragraph (e) and (f) of the definition of "domestic relationship" provided for in section 1 of the Domestic Violence Act.

²⁰¹ See the above discussion in respect of extortion and fraud in this regard.

²⁰² SA Law Reform Commission *Project 131 Trafficking in Persons Report* 16.

²⁰³ Sub-paragraph (d) of the definition of "domestic relationship"; section 1 of the Domestic Violence Act; Kruger *Combating Human Trafficking* 461.

²⁰⁴ Sub-paragraph (f) of the definition of "domestic relationship", section 1 of the Domestic Violence Act. Kruger *Combating Human Trafficking* 461; SA Law Reform Commission *Project 131 Trafficking in Persons Report* 16.

The Domestic Violence Act provides a wide array of remedies to victims. Complainants can apply for protection orders to a local court.²⁰⁵ Police officers, have a statutory duty to assist a victim in a suspected situation of domestic violence.²⁰⁶ Peace officers, which include police officers, are afforded the right to arrest a suspect of domestic violence at the scene of an offence without a warrant.²⁰⁷ Victims of domestic violence must further be assisted by providing them with alternative accommodation or providing medical help to such victim if the situation requires it.²⁰⁸ The act provides that where a protection order is granted against an offender in favour of the complainant and such offender breaches the protection order, prosecution under the Domestic Violence Act can be instituted.²⁰⁹

The broad definition provided to the terms “domestic violence” and “domestic relationship” by the Domestic Violence Act leads thereto that many, if not most, victim and trafficker relationships will fall under the scope of relationships and instances protected by this act.²¹⁰ Even where physical violence is not present, acts of the subtler economic, emotional or psychological abuse, often present in the trafficking process, constitute domestic violence against which a complainant is provided with recourse in terms of this act. The greater barrier to obtaining the assistance of this legislation in instances of trafficking, lies therein that the protection is predominantly actuated through the actions of a trafficking victim him- or herself. In order to obtain a protection order, the trafficking victim would have to apply to the court. Practically, the Act’s protective measures are inhibited in that trafficked victims do not have control of their own movements or whereabouts and if so, would either be escorted or closely monitored. Besides the prohibitions on their freedom of movement, victims have often suffered emotional and psychological abuse through threats and manipulation to such extent that they do not have the courage to speak out against their handlers. In these cases, the Domestic Violence Act protection is limited to discoveries of such scenes of trafficking by the police, the duty to assist victims in terms of section 2 and the authority to arrest offenders without warrants in terms of section 3 of this act. However, where the trafficking is of a different nature, such as might perhaps be the case in the illegal application of the *ukuthwala* custom, the Domestic Violence Act could provide a remedy for the *thwala*-ed victim. If one considers the facts of the *Jezile* case, it is submitted that Jezile’s *thwala*-ed victim would have qualified as a complainant able to obtain a protection order under the Domestic Violence Act. Granting that the protection order does not expire, it will most probably not be the final hammer-down of justice for a victim. Even so, it provides effective interim relief pending the finalisation of trials on potentially more serious

²⁰⁵ Section 4(1) of the Domestic Violence Act.

²⁰⁶ Section 2 of the Domestic Violence Act.

²⁰⁷ Section 3 of the Domestic Violence Act.

²⁰⁸ Section 2(a) of the Domestic Violence Act.

²⁰⁹ Section 7 of the Domestic Violence Act.

²¹⁰ Refer to Kruger *Combating Human Trafficking* 461.

matters that could lead to imprisonment, such as assault or rape. The Domestic Violence Act therefore has the ability to provide protection for a broad category of trafficking victims.

4.3.3. The Recognition of Customary Marriages Act 120 of 1998

The Recognition of Customary Marriages Act 120 of 1998 ("Customary Marriages Act") determines the circumstances under which marriages that are valid in terms of South African customary law will be recognised as valid marriages in common law. Section 2 of this act dictates that any marriage valid by customary law will also be seen as a marriage.²¹¹ As such, as minimum standard such marriage must meet the requirements set for it by customary law. Where the *ukuthwala* custom's mock abduction is abused to veil the actual non-consensual nature of the abduction and consequent marriage, this act will render such marriage invalid based on the fact that it does not comply with the actual definition of *ukuthwala*. Failing to meet the *ukuthwala* requirements will disqualify the "marriage" relationship as validly concluded customary law marriage. Furthermore, the Customary Marriages Act requires marriages to be concluded between persons older than eighteen years of age, failing which parental or ministerial consent must be obtained in order for such marriage to be regarded as a valid marriage.²¹² Section 3 of this Act further dictates that both parties must consent to be married to each other in terms of customary law and that such marriage must be concluded and celebrated in terms of customary law traditions.²¹³ Although prosecution in terms of the Sexual Offences Act or common law crimes is more advisable in cases of sexual intercourse with minors, the Customary Marriages Act can assist a coerced victim in determining that a marriage will not be valid unless it meets the requirements as set out in this act. Minors forced in customary marriages can over and above the arsenal of statutory and common law crimes also rely on the provisions of this act to be freed from a forced invalid marriage. The prosecutorial impact of the Customary Marriages Act is, however, limited in that the nature of this legislation is to determine when customary marriages will be valid rather than when they constitute a crime. As no offence or penalty clauses are provided, this act is not of great assistance to the prosecution in cases of trafficking.²¹⁴

²¹¹ Section 2(1) and (2) of the Customary Marriages Act.

²¹² Section 3(1)(a)(i), 3(3), 3(4), (5) of the Customary Marriages Act read with section 25 of the Marriage Act 25 of 1961.

²¹³ Section 3(1)(a)(ii) and 3(b) of the Customary Marriages Act.

²¹⁴ Mollema rightly notes that prosecution in terms of the Sexual Offences Act is more readily pursued than in terms of the Customary Marriages Act. However, as the Customary Marriages Act does not render a breach of its terms an offence unless such offence is created by the regulations in terms of section 4 of this act and the regulations do not render such contravention of section 3 an offence, the Customary Marriages is not effective in prosecution of such contraventions; Mollema *Combating Human Trafficking In South Africa* 457.

4.3.4. Identification Act 68 of 1997

In terms of the Identification Act 68 of 1997 ("Identification Act") it is an offence to alter, falsify or destroy an identity document or to allow it to be done.²¹⁵ It is also an offence to give out that incorrect identity document details are correct.²¹⁶ This act further criminalises the possession of another person's identity card for unlawful purposes.²¹⁷ Trafficking often makes use of identity theft and fraud by producing falsified travel documentation in order to transport victims. Where participants of the trafficking cycle alter, fabricate, destroy or confiscate such fabricated identity documents of their victims they can successfully be prosecuted in terms of the provisions of the Identification Act. Certain scholars argue that the provisions of this act will not be sufficient to ensure conviction in cases where a person is found in possession of a valid identity document of another.²¹⁸ However, section 18(1)(f) provides that any person who allows "an identity card, a certificate or a temporary identity certificate belonging to him or her or which is under his or her control, to come into the possession of any other person for an unlawful purpose". By including instances where the identity document is not necessarily that of the offender but under their control and that offender causes that document to come into the possession of another for an unlawful purpose, the act also criminalises the possession of valid identity documents. This provision could be utilised to prosecute parents that "sell" their children to traffickers and, so doing, hand over their identity documents. It is submitted that possession of both fabricated and valid documents in the correct circumstances can be successfully prosecuted. Upon conviction, sentences consisting of a fine and/or imprisonment up to five years can be imposed.²¹⁹ The statutory provisions of this act are, therefore, another effective tool to combat some of the underlying offences that often constitute essential links in the trafficking process.

4.3.5. Immigration Act 13 of 2002

The Immigration Act 13 of 2002 ("Immigration Act") regulates the entry into and the departure from the Republic of South Africa. Section 9(1) of this act determines that persons may only enter and depart from South Africa through a port of entry. Section 9(3) further provides that such persons must present a valid identification document upon entering and departing through such port of entry. The illegal presence of traffickers as well as the victims of such traffickers can be prosecuted in terms of the Immigration Act. A sentence of a fine or imprisonment of

²¹⁵ Section 18(1)(e) of the Identification Act.

²¹⁶ Section 18(1)(g) of the Identification Act.

²¹⁷ Section 18(1)(f) of the Identification Act.

²¹⁸ Kruger *Combating Human Trafficking* 439; Kruger refers to L Stuurman "Anti-trafficking Legislation Can No Longer Be Delayed" (2004) *Eye on Human Trafficking* 5.

²¹⁹ Section 18(2) of the Identification Act.

maximum two years can be imposed.²²⁰ Section 49(2) of the Immigration Act also provides that it is an offence to assist any person to enter into, remain or depart from South Africa in contravention of the Act. In this regard traffickers could face a fine and imprisonment of up to five years for causing trafficking victims to be brought into South Africa illegally either by not coming through a valid port of entry or not presenting valid identification documentation. Section 49(3) further criminalises the employment of illegal foreigners. Prosecutors could therefore employ this provision as a further charge against traffickers. The Immigration Act does not define employment or employee.²²¹ However, in applicable cases the existing labour law definitions of these terms have been considered in light of the Constitution by our courts.²²² The Constitutional Court has held that the right to fair labour practices, enshrined by section 23 of the Constitution, is a right afforded to everyone including those that are not employed under a contract of employment.²²³ The *Discovery v CCMA* and *Lanzetta* judgement confirmed that this also means the right to fair labour practices extends to those employed in contravention of the Immigration Act.²²⁴ It is accepted that even where individuals are trafficked for purposes of slavery or labour, they should qualify as employees for purposes of prosecuting a trafficker under section 49(3) of the Immigration Act. In the recent case of *Kylie v Commission for Conciliation Mediation and Arbitration and Others*, the court confirmed that the right to fair labour practices is also provided to sex workers whether or not they are illegal immigrants.²²⁵ The provisions of this act provides prosecution with grounds to successfully prosecute traffickers that are illegal immigrants and that transport victims of trafficking into the country illegally. A major concern for prosecution under the Immigration Act is the lack of protection afforded to illegal foreign victims.²²⁶ In that the Immigration Act provides for the immediate deportation of individuals that have been found to be in the country illegally, it does not afford individuals that are victims of trafficking, the internationally prescribed minimum victim protection or assistance.

²²⁰ Section 49(1)(a) of the Immigration Act.

²²¹ Section 1 of the Immigration Act does provide a definition for the term “employer”. The following definition is provided:

“employer” includes a person contractually bound by the applicable employment contract as an employer or, in the case of a juristic person, its chief executive officer or the person to whom such officer has delegated the final responsibility in respect of personnel matters’.

²²² *Discovery Health Limited v Commission for Conciliation, Mediation and Arbitration and Others* (JR 2877/06) 2008 ZALC 24 (“Discovery v Lanzetta”); *Kylie v Commission for Conciliation Mediation and Arbitration and Others* 2010 ZALAC 8 (“Kylie v CCMA”).

²²³ *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* (CCT2/02) 2002 ZACC 27.

²²⁴ *Discovery v Lanzetta*, above; B Workman-Davies “*The Rights of Illegal Workers and Workers Engaged in Illegal Activities in South Africa*” (2018) <<https://www.werksmans.com/legal-updates-and-opinions/rights-illegal-workers-workers-engaged-illegal-activities-south-africa/>> (accessed 9 March 2019).

²²⁵ *Kylie v CCMA*, above.

²²⁶ SA Law Reform Commission *Project 131: Trafficking in Persons Report* 62-63.

The deportation of trafficking victims without any address of the trafficking situation facilitates their re-trafficking.²²⁷ Although the provisions of the Immigration Act are still relevant in combating the trafficking of foreign individuals, they should, pending amendment of these provisions to provide for trafficking-specific situations, be applied with caution with due consideration of the prevalence of trafficking in the relevant jurisdiction and the internationally prescribed rights of protection and assistance victims are to be afforded.²²⁸

4.3.6. Intimidation Act 72 of 1982

Traffickers generally utilise intimidation to ensure their victims comply with their commands.²²⁹ The Intimidation Act 72 of 1982 (“Intimidation Act”) provides that such conduct is prohibited in appropriate circumstances. The provisions of this act as they currently stand, reads:

- “(1) Any person who—
- (a) without lawful reason and with intent to compel or induce any person or persons of a particular nature, class or kind or persons in general to do or to abstain from doing any act or to assume or to abandon a particular standpoint—
- (i) assaults, injures or causes damage to any person; or
- (ii) in any manner threatens to kill, assault, injure or cause damage to any person or persons of a particular nature, class or kind; or
- (b) acts or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication—
- (i) fears for his own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person; and
- shall be guilty of an offence and liable on conviction to a fine not exceeding R40 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment.”

Upon initial consideration, it is clear that section 1 of the Intimidation Act criminalise a very broad range of conduct by persons that attempt to incite another to perform in a certain manner where no lawful reason for such incitement exists. It would, therefore, based on the wide range of

²²⁷ Mollema *Combating Human Trafficking in South Africa* 440; Kruger *Combating Human Trafficking* 440.

²²⁸ SA Law Reform Commission *Project 131: Trafficking in Persons Report* 62; Mollema *Combating Human Trafficking in South Africa* 440; Kruger *Combating Human Trafficking* 440.

²²⁹ SA Law Reform Commission *Project 131: Trafficking in Persons Report* 17.

conduct prohibited under this section, be expected that all or, at least, most intimidation tactics applied by traffickers would be punishable in terms of section 1 of the Intimidation Act. However, in both *S v Motshari* as well as *S v Gabatthole* the court limited the scope of these provisions to only be applicable to acts that fall within the primary objective of the Intimidation Act.²³⁰ In *S v Motshari* the court held that the act did not apply to a quarrel between cohabitating lovers that took place within the confines of their residence as such conduct did not constitute riotous behaviour.²³¹ Similarly, in *S v Gabatthole* the court confirmed that the purpose of the act is not to apply to less serious threats. Seeing that the primary objective of the act is to “*bring security legislation into line with the new dynamic situation developing in South Africa in order to ensure normal and free political activities*”, the application of these provisions to incidences of trafficking will be limited as well.²³² As convictions under these provisions have been achieved where witnesses have been intimidated not to testify against an accused, these provisions could provide protection for trafficking victims that are to give evidence against those who trafficked them.

The provisions of these acts, specifically section 1(1)(b) and section 1(2), have come under serious constitutional scrutiny. In both abovementioned cases, the constitutionality of section 1(2) of the Intimidation Act has been questioned by the courts.²³³ Section 1(2) provides that the onus to prove the existence of a lawful reason, as required in terms of section 1(1)(a) and 1(1)(b), rests on the accused.²³⁴ In the recent 2018 case of *Moyo v The Minister of Justice and Constitutional Development & Others* the Supreme Court of Appeal declared section 1(2) unconstitutional and referred the matter to the Constitutional Court for confirmation.²³⁵ Should the Constitutional Court confirm the declaration of invalidity, prosecutors will now have the onus of proving the element of existence of an unlawful reason for the intimidating actions by the accused. However, in the *Moyo* case, application was also made to declare section 1(1)(b) unconstitutional on the basis that it infringes the right to freedom of expression as enshrined by section 16(1) of the Constitution. The Supreme Court of Appeal did not agree with the applicant. However, the matter is being appealed to the Constitutional Court. Should it be successful,

²³⁰ *S v Motshari* 2001 1 SACR 550 (NC); *S v Gabatthole* 2004 2 SACR 270 (NC).

²³¹ *S v Motshari* 2001 1 SACR 550 (NC) 550F-G, 551E-554B; South African Law Reform Commission *Project 130 Stalking Report* (2006) 26.

²³² SA Law Reform Commission *Project 130 Report on Stalking* 26.

²³³ SA Law Reform Commission *Project 130 Report on Stalking* 26.

²³⁴ Section 1(2) provides: “(2) *In any prosecution for an offence under subsection (1), the onus of proving the existence of a lawful reason as contemplated in that subsection shall be upon the accused, unless a statement clearly indicating the existence of such a lawful reason has been made by or on behalf of the accused before the close of the case for the prosecution.*”

²³⁵ *Moyo v The Minister of Justice and Constitutional Development & others; Sonti v The Minister of Justice and Correctional Services & others* (387/2017; 386/2017) 2018 (2) SACR 313 (SCA).

prosecution will only be possible in terms of section 1(1)(a) of the Intimidation Act.²³⁶ The Act's applicability is uncertain and limited in respect of trafficking crimes. Nonetheless, it provides the prosecution with a measure to protect trafficking victim complainants along with other witnesses and to prosecute traffickers in appropriate cases and should be utilised in this regard.

4.3.7. Drugs and Drug Trafficking Act 140 of 1992

The trafficking of persons and drugs historically coincide. Drugs play a role in both the pacification of victims as well as a part of the traffickers' actual trade.²³⁷ The Drugs and Drug Trafficking Act 140 of 1992 ("Drug Trafficking Act") criminalises the use, possession, manufacture, supply and dealing in dependence-producing drugs.²³⁸ Traffickers often keep victims in isolated facilities whilst forcing them to take dependence-producing drugs in order to obtain control over these victims.²³⁹ So doing, the victims are made to be dependent on the trafficker for access to the drugs due to their induced addiction. This constitutes a breach of section 4 of the Drug Trafficking Act for which a sentence of a maximum fifteen years imprisonment and a fine as the court deems fit could be imposed.²⁴⁰ Further, traffickers' main business is not necessarily that of trafficking of persons but could involve other serious crimes such as the trafficking of scheduled drugs. For this, they make use of persons to transport the drugs as mules.²⁴¹ The dealing in drugs is prohibited by section 5 of the Drug Trafficking Act. Traffickers can be prosecuted where they have trafficked persons to be used in their drug dealing process. A penalty of up to twenty five years imprisonment and/or a fine that the court deems fit can be imposed in cases of conviction of dealing in drugs.²⁴² Section 13(a) of the Drug

²³⁶ The *Moyo* case has been heard by the Constitutional Court on 19 February 2019 and is still awaiting judgement at present.

²³⁷ The 2007 UNESCO: Human Trafficking in South Africa: Root Causes and Recommendations Policy Paper 14.5(E) highlights the corresponding link between trafficking in persons and other crimes such as those involving drugs. On page 62 of this policy report, it is concluded that an increase in drug-related crimes as a result of trafficking in South Africa is imminent.

²³⁸ Section 3, 4 and 5 of the Drug Trafficking Act.

²³⁹ These actions can also be prosecuted as assault. Refer to the discussion on 4.2.1 above; Kruger *Combating Human Trafficking* 455.

²⁴⁰ Section 17(b) provides for a maximum penalty of 5 years imprisonment and/or a fine in cases of possession of dependence-producing drugs, as set out in part 1 of schedule 2 to the Drug Trafficking Act. Section 17(d) provides for a maximum penalty of 15 years imprisonment and/or a fine in cases of possession of dangerous dependence-producing drugs, as set out in part 2 of schedule 2 to the Drug Trafficking Act.

²⁴¹ Mollema *Combating Human Trafficking in South Africa* 459.

²⁴² Section 17(c) provides for a maximum penalty of 10 years imprisonment and/or a fine in cases of dealing in dependence-producing drugs, as set out in part 1 of schedule 2 to the Drug Trafficking Act. Section 17(d) provides for a maximum penalty of 25 years imprisonment and/or a fine in cases of dealing in dangerous dependence-producing drugs, as set out in part 2 of schedule 2 to the Drug Trafficking Act.

Trafficking Act further criminalises the act of placing drugs in the possession of or in the premises of on the same vehicle as an individual with the intent that such individual be convicted of a crime under the Drug Trafficking Act.²⁴³ This is a further provision in terms of which to prosecute drug and human traffickers in the combat of the trafficking problem. The maximum sentence that can be imposed for a contravention of section 13(a) is imprisonment of up to one year and/or a fine.²⁴⁴ In light of the urgency and seriousness of the problem of trafficking of both persons and drugs in South Africa, it could be necessary to re-evaluate the appropriateness of a maximum five year prison sentence. Where the traffickers also manufacture these drugs, they can also be held liable in terms of section 3 of this Act. The maximum sentence to be imposed in these cases is fifteen years imprisonment and/or a fine.²⁴⁵ The risk of which police officers and prosecutors must remain mindful is that the trafficking victim in whose possession the drugs are found could be incorrectly prosecuted as opposed to the actual trafficking dealer. It is advisable that appropriate investigative measures and interrogation methods be developed for such scenarios. As the penalties for these drug-related crimes are severe, the provisions of the Drug Trafficking Act present great deterrent attributes. Sentencing practices for purposes of trafficking in persons should follow this lead.

4.3.8. Sexual Offences Act 23 of 1957

The Sexual Offences Act 23 of 1957 ("Sexual Offences Act") criminalises a number of crimes that form a fundamental part of the cycle of trafficking of persons for sexual exploitation. Although quite a few of the provisions of this act have been repealed, many are still applicable to human trafficking offences. In terms of section 2 of this Act, the keeping of a brothel is strictly prohibited.²⁴⁶ A "brothel" is defined in section 1 of the act as including:

"any house or place kept or used for purposes of prostitution or for persons to visit for the purpose of having unlawful carnal intercourse or for any other lewd or indecent purpose."

Section 3 of the Sexual Offences Act further provides grounds upon which a person will be deemed to keep a brothel for purposes of prosecution under section 2 of this Act. These grounds include any person that resides in a brothel, any person who manages or assists in management

²⁴³ Section 13(a) of the Drug Trafficking Act:

"Any person who—

(a) places any drug in the possession, or in or on the premises, vehicle, vessel or aircraft, of any other person with intent that the latter person be charged with an offence under this Act,"

²⁴⁴ Section 17(b) of the Drug Trafficking Act.

²⁴⁵ Section 17(d) of the Drug Trafficking Act.

²⁴⁶ Section 2 of the Sexual Offences Act.

of a brothel, any owner of premises that lets such premises for purposes of brothel-keeping as well as any person that receives money at a brothel.²⁴⁷ Section 10 further criminalises the procurement of a female for purposes of sexual intercourse with any person other than her lawful husband, defined as unlawful carnal intercourse by the act. Section 12 provides that the detention of a female for purposes of unlawful carnal intercourse is a further offence. Assisting any person intentionally or whilst he reasonably ought to have foreseen the possibility of unlawful carnal intercourse in communicating with another person with which that person may have unlawful carnal intercourse is also a criminal offence in terms of section 12A of the Act. Section 17 further prohibits an owner or occupier of premises from knowingly permitting such premises to be used in any manner that would constitute an offence under the Sexual Offences Act. Section 20 allows for prosecution of any person that lives from the earnings of prostitution.²⁴⁸ This section also provides for prosecution of the female receiving reward for sexual acts.²⁴⁹

This Act can be applied to a variety of actions that constitute fragments of the trafficking for sexual exploitation cycle. Any person that trafficks females for purposes of prostitution in a brothel which trafficking entails procuring females for this purpose, detaining them at any stage or assisting another to have unlawful carnal intercourse can be prosecuted under the provisions of the Sexual Offences Act. Where these provisions are specifically helpful, is in prosecuting persons that play a delegated, fragmental role in a part of the trafficking process where not all of the elements of the crime of trafficking in persons can be established in order to ensure a trafficking conviction. A handler, that for example only manages and keeps women at a brothel for prostitution purposes without the knowledge of the details of such trafficking such as where they are brought from or how they are transported to the brothel, might not be capable of being convicted of trafficking, but could successfully be prosecuted under the provisions of this Act. In the unreported case of *S v Sayed and Another* the accused were convicted of contraventions of sections 2, 12A(1), 10, 17, 20(1)(a) and (c) of the Sexual Offences Act based on the facts that Thai women were trafficked from Thailand in order to perform sex work at a brothel in South Africa.²⁵⁰ In this case, both the traffickers as well as the trafficked were convicted. The risk that prosecutors will have to be mindful of is in securing convictions of trafficking victims where they had no consent in the matter, as this would be a breach of the international requirements to protect victims of trafficking. An obvious shortfall that proves the need for adequate legislation dealing with trafficking in completeness is the fact that this act is limited to application in respect

²⁴⁷ Section 3(a) to (g) of the Sexual Offences Act.

²⁴⁸ Section 20(1) of the Sexual Offences Act.

²⁴⁹ Section 20(1A) of the Sexual Offences Act.

²⁵⁰ *S v Sayed and Another* case no. 041/2713/2008 Durban Regional Court (unreported).

of female victims.²⁵¹ Nonetheless, the provisions of this Act, as seen in *S v Sayed* can be of assistance in securing convictions of trafficking perpetrators.

4.3.9. Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (“Sexual Offences Amendment Act”) purports to enact “*all matters relating to sexual offences in a single statute*”²⁵² and to criminalise “*all forms of sexual abuse or exploitation*”²⁵³. Pending the enactment of specific anti-trafficking legislation that comprehensively regulates all aspects of the crime of trafficking in persons, interim measures were provided for in the Sexual Offences Amendment Act.²⁵⁴ Section 71(1) criminalised the trafficking of a person for purposes of sexual exploitation without the consent of that person.²⁵⁵ A thorough consideration of the provisions of these interim measures is no longer applicable as these have been repealed by the consequent promulgation of the Trafficking Act. However, for purposes of this study it suffices to state that the provisions of section 71 were found by certain scholars as not fully compliant with the international requirements of the Palermo Protocol.²⁵⁶ The Trafficking Act is the only statute providing for criminalisation of the newly defined offence of trafficking in that form. However, the provisions of the Sexual Offences Amendment Act that criminalise specific other sexual offences including rape,²⁵⁷ sexual assault,²⁵⁸ certain compelled sexual offences against persons older than eighteen years,²⁵⁹ sexual grooming of children,²⁶⁰ using children to produce pornography for sale²⁶¹ or sexual offences against mentally disabled persons, are still applicable and can be effectively utilised to ensure prosecution of these acts against offenders in conjunction with the

²⁵¹ Stuurman “Anti-trafficking Legislation Can No Longer Be Delayed” (2004) Eye on Human Trafficking 5.

²⁵² Section 2(a) of the Sexual Offences Amendment Act.

²⁵³ Section 2(b) of the Sexual Offences Amendment Act.

²⁵⁴ Part 6 of the Sexual Offences Amendment Act (sections 70 to 72). These provisions were effective from 16 December 2007 until 9 August 2015 when the Trafficking Act provisions came into effect, repealing the interim sections. Convictions in terms of this act were secured in many cases including: *S v Eloff* with case number SH599/08 Welkom (2008) and *Dos Santos v S* 2018 1 SACR 20 (GP).

²⁵⁵ Section 71(1) provides: “A person (‘A’) who trafficks any person (‘B’), without the consent of B, is guilty of the offence of trafficking in persons for sexual purposes.”

²⁵⁶ For a comprehensive discussion and evaluation of the interim anti-trafficking provisions of the Sexual Offences Amendment Act refer to Kruger *Combating Human Trafficking* 490.

²⁵⁷ Part 1: sections 3 and 4 of the Sexual Offences Amendment Act.

²⁵⁸ Part 2: sections 5, 6 and 7 of the Sexual Offences Amendment Act.

²⁵⁹ Part 3: sections 8 to 11 of the Sexual Offences Amendment Act.

²⁶⁰ Section 18 of the Sexual Offences Amendment Act.

²⁶¹ Section 20 of the Sexual Offences Amendment Act.

Trafficking Act provisions, or where the elements of the full trafficking offence are lacking.²⁶² Considering that trafficking of persons, especially where such trafficking is for the purpose of sexual exploitation, more often than not entail the sexual abuse or exploitation of the trafficked victim, the provisions of this act must be utilised to bring such offenders to book.²⁶³

4.3.10. Child Care Act 74 of 1983 and Children's Act 38 of 2005

The provisions of the Child Care Act 74 of 1983 ("Child Care Act") have been repealed by the Children's Act 38 of 2005 ("Children's Act").²⁶⁴ The Child Care Act was promulgated to provide for the protection and welfare of children.²⁶⁵ Although it has been repealed, it remains applicable to offences prior to it being repealed. Illegal adoptions, ill-treatment of children by parents or guardians, abduction, unlawful removal of a child from their legal place of custody, inducing a child to flee from the place of their legal custody, prohibiting a child from returning to its legal place of custody or any involvement in the commercial sexual exploitation of children will constitute an offence in terms of the Child Care Act.²⁶⁶ Similar to the *Dos Santos* case, where such offences were proven to have taken place prior to the coming into force of the Children's Act, convictions under the Child Care Act can still be secured.²⁶⁷

The Children's Act was promulgated to provide comprehensive legislative regulation in respect of a range of child-related matters, including the provision of children's rights, the care and protection of children, the regulation of court proceedings where children are involved as well as creating criminal offences relating to children.²⁶⁸ Chapter 18 specifically established

²⁶² Chapter 4: sections 25 and 26 of the Sexual Offences Amendment Act.

²⁶³ See *S v Sayed and Another* Case No. 041/2713/2008 Durban Regional Court (unreported).

²⁶⁴ The Children's Act was promulgated into law by Government Gazette on 19 June 2006 and most of the provisions came into force on 1 July 2007.

²⁶⁵ The long title of the Child Care Act is: "*To provide for the establishment of children's courts and the appointment of commissioners of child welfare; for the protection and welfare of certain children; for the adoption of children; for the establishment of certain institutions for the reception of children and for the treatment of children after such reception; and for contribution by certain persons towards the maintenance of certain children; and to provide for incidental matters.*"

²⁶⁶ Chapter 4 and chapter 8 of the Child Care Act, particularly section 50, 50A and 51 of the Child Care Act.

²⁶⁷ In the case of *Dos Santos v S* 2018 1 SACR 20 (GP) heard in the Pretoria Regional Court and thereafter appealed to the Gauteng High Court, Aldina Dos Santos was convicted on three counts of trafficking of three Mozambican girls between the ages of fourteen and seventeen and sentenced to life imprisonment.

²⁶⁸ The long title of the Children's Act describes the act as: "*To give effect to certain rights of children as contained in the Constitution; to set out principles relating to the care and protection of children; to define parental responsibilities and rights; to make further provision regarding children's courts; to provide for the issuing of contribution orders; to make new provision for the adoption of children; to provide for inter-country adoption; to give effect to the Hague Convention on Inter-country Adoption; to prohibit child*

provisions to criminalise all acts of trafficking of children.²⁶⁹ Together with the relevant provisions of the Sexual Offences Act, chapter 18 of the Children's Act constituted the South African interim anti-trafficking provisions, pending promulgation of comprehensive counter-trafficking laws in adherence to South Africa's international requirements under the Convention and the Palermo Protocol. These interim provisions that criminalised all acts of trafficking relating to children for purposes of exploitation were repealed by the Trafficking Act.²⁷⁰ However, similar to the Sexual Offences Act, the remaining provisions of the Children's Act further dictate what would constitute prosecutable offences against minors. Crimes relevant to the trafficking context are unlawful adoption,²⁷¹ child abduction,²⁷² or surrogate motherhood in contravention of the Act. Section 305 declares it an offence to give or receive any consideration for the adoption of a child or to induce any person to give up a child for adoption in terms of the Act.²⁷³ Contravening section 252 by publishing an advertisement in respect of the adoption of a specific child also constitutes an offence of the Children's Act.²⁷⁴ These provisions could therefore be applied to trafficking of children by way of forced adoption or by way of adoption or adoption-related acts that contravenes the abovementioned provisions. Where traffickers are in the business of illegal adoptions that cross country borders, they can be prosecuted for facilitating inter-country adoptions in contravention of the procedure set out in the Children's Act.²⁷⁵ Section 301 prohibits payments to be made to any person in respect of surrogacy (with the exception of certain specifically allowed surrogacy-related costs or compensation for loss of income of such surrogate mother due to the surrogate motherhood agreement).²⁷⁶ Section 303 also renders it

abduction and to give effect to the Hague Convention on International Child Abduction; to provide for surrogate motherhood; to create certain new offences relating to children; and to provide for matters connected therewith."

²⁶⁹ Section 284 read with the definition of "trafficking" in section 1 of the Children's Act.

²⁷⁰ The Trafficking Act provisions came into effect on 9 August 2015, repealing the interim provisions set out in the Sexual Offences Act and the Children's Act; South African Law Reform Commission *Project 130 Stalking Report* 11.

²⁷¹ The prescribed manner of adoption is regulated in chapter 15 (sections 228 to 253) and chapter 16 (sections 254 to 273) of the Children's Act, with the latter specifically providing for inter-country adoptions.

²⁷² Chapter 17: section 274 to 280 of the Children's Act.

²⁷³ Section 305(1)(b) read with section 249 of the Children's Act. Section 249(2) of the Children's Act lists the expenses relating to the adoption for which reasonable compensation may be provided.

²⁷⁴ Section 305(1)(b) read with section 252 of the Children's Act.

²⁷⁵ Section 305(1)(b) read with section 273 of the Children's Act.

²⁷⁶ Section 301 provides:

- "(1) Subject to subsections (2) and (3), no person may in connection with a surrogate motherhood agreement give or promise to give to any person, or receive from any person, a reward or compensation in cash or in kind.
- (2) No promise or agreement for the payment of any compensation to a surrogate mother or any other person in connection with a surrogate motherhood agreement or the execution of such an agreement is enforceable, except a claim for -

illegal to artificially fertilise another person without the consent of a competent court.²⁷⁷ Therefore, where traffickers enter into an agreement with women to act as surrogate mothers either illegally, without authorisation from a court, or for any compensation, they can be prosecuted in terms of this Act. Trafficked victims, especially children in cases of trafficking for forced labour, are often not provided with the contraceptives that they request or that could be requested under normal circumstances.²⁷⁸ In such cases, traffickers can be prosecuted in terms of section 134 of the Children's Act for refusing to provide the child victim, where such victim is older than twelve years, with requested contraceptives.²⁷⁹ Offenders that have been convicted in terms of section 305 of such offences against children as part of a trafficking process can be sentenced to imprisonment of maximum ten years and/or a fine for first offences and up to a maximum of twenty years imprisonment and/or a fine in cases of more than one conviction of such offence.²⁸⁰ It is clear that the Children's Act provisions provide for substantial sentences and do not tolerate conduct in contravention of the best interest of the child.²⁸¹ Charges in terms of this act should be instituted against offenders that have made themselves guilty of trafficking-related crimes against children in contravention of this Act.

4.3.11. Prevention and Combatting of Corrupt Activities Act 12 of 2004

Trafficking of persons regularly entail corrupt activities. Such activities can be prosecuted in terms of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 ("the PCCA"). The PCCA is a response to South Africa's international obligations to enact legislation that counter corrupt activities as prescribed by the Convention. The PCCA acknowledges that it is necessary to unbundle the crime of corruption in order to provide for the criminalisation of corruption as a

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- (a) *compensation for expenses that relate directly to the artificial fertilisation and pregnancy of the surrogate mother, the birth of the child and the confirmation of the surrogate motherhood agreement;*
 - (b) *loss of earnings suffered by the surrogate mother as a result of the surrogate motherhood agreement; or*
 - (c) *insurance to cover the surrogate mother for anything that may lead to death or disability brought about by the pregnancy.*
- (3) *Any person who renders a bona fide professional legal or medical service with a view to the confirmation of a surrogate motherhood agreement in terms of section 295 or in the execution of such an agreement, is entitled to reasonable compensation therefor."*

²⁷⁷ Section 305(1)(b) read with section 303 of the Children's Act.

²⁷⁸ Mollema *Combating Human Trafficking in South Africa* 161.

²⁷⁹ Section 305(1)(c) read with section 134 of the Children's Act.

²⁸⁰ Section 305(6) and (7) of the Children's Act.

²⁸¹ Section 9 of the Children's Act provides:

"In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied."

general, broad and all-encompassing offence whilst further creating offences in respect of various specific corrupt activities.²⁸² The general crime of corruption as defined by the PCCA can be abbreviated to read as follows:

“Anybody who
 (a) accepts any gratification from anybody else, or
 (b) gives any gratification to anybody else”²⁸³

As mentioned by the court in *Scholtz and Others v S*, “gratification” is a “word of wide connotation”.²⁸⁴ The definition of “gratification” in section 1 of the PCCA includes “money, a gift, a loan, an interest in property, any favour or advantage of any description, and any real or pretended aid or influence”.²⁸⁵ Where traffickers offer any form of such gratification to persons in order to obtain possession of another person for the purpose of trafficking of that person, a conviction on a charge of corruption in terms of this act can be secured. This will include cases where traffickers pay a parent, teacher or guardian of a child an amount to obtain the child. The provisions of this act also prohibit situations where foreign men that struggle financially agree to traffic their female family members to South Africa in order for them to become sex workers.²⁸⁶ The Act also criminalises corrupt activities in respect of specific persons.²⁸⁷ Where public officials, such as border control, home affairs or police officials, are offered or accept a benefit from a trafficker in order to act against their legal duty, both the trafficker and the official can be prosecuted for corruption. These provisions can be effective in curbing the illegal entrance of unregistered children or other persons without the required visa or identification documents or where documents are falsified or fraudulently produced and officials form part of this process.²⁸⁸ The PCCA further places a duty on any person in a position of authority to report any corrupt activity, offence of theft, fraud, extortion, forgery or uttering a forged document or any suspicion of such offence to a police official.²⁸⁹ A failure to report such a corrupt activity is an offence punishable by a maximum of ten years of imprisonment and a fine.²⁹⁰ This reporting duty

²⁸² Preamble of the PCCA.

²⁸³ Section 3 of the PCCA; Snyman *Criminal Law* 6th edition (2014) 403; *Scholtz and Others v S* 2018 4 All SA 14 (SCA) (21 August 2018) (“*Scholtz and Others v S*”) at paragraph 123; Kruger *Combating Human Trafficking* 454.

²⁸⁴ *Scholtz and Others v S* at paragraph 123.

²⁸⁵ *Scholtz and Others v S* at paragraph 123.

²⁸⁶ UNESCO *Policy Paper No 14.5 (E) Human Trafficking in South Africa: Root Causes and Recommendations* (2007) 22.

²⁸⁷ Part 2: sections 4 to 9 of the PCCA.

²⁸⁸ UNESCO *Policy Paper No 14.5 (E)* 26; K Fitzgibbon *Modern Day Slavery? The Scope of Trafficking in Persons in Africa* (2003) Africa Security Review 12(1).

²⁸⁹ Section 34(1) and (2) of the PCCA.

²⁹⁰ Section 34(2) read with section 26(1)(b) of the PCCA.

encourages individuals presented with an unlawful benefit to report it, which in return, could lead to successful prosecution of the trafficker presenting the benefit. The PCCA also provides courts with extra-territorial jurisdiction to prosecute the commission of PCCA offences that transpired outside the South African border.²⁹¹ As such, the PCCA remains effective to prosecute international crime syndicates that operate out of another country in appropriate circumstances.²⁹² Due to the severe infiltration of corruption in South Africa, including that of government and judiciary bodies, the courts are reluctant to impose sentences below that of the provided minimum sentence.²⁹³ The PCCA provides for a maximum sentence of life imprisonment where the offender is to be sentenced by a High Court, eighteen years if sentenced by a regional court and up to five years if sentenced by a magistrate court.²⁹⁴ The PCCA provides added measures to curtail crucial links of the trafficking process which can also be used to impose effective deterrent and preventative sentences.

4.3.12. Prevention of Organised Crime Act 121 of 1998

It is widely accepted that trafficking of drugs and persons are generally an organised crime prevalence which regularly involves organised criminal groups. Due to its fragmented nature, the crime of trafficking often necessitates the involvement of numerous people rather than an individual.²⁹⁵ The Prevention of Organised Crime Act 12 of 1998 ("POCA") was promulgated by

²⁹¹ Section 35 of the PCCA.

²⁹² Section 35(1) of the PCAA sets the following requirements for extraterritorial jurisdiction:

"(1) *Even if the act alleged to constitute an offence under this Act occurred outside the Republic, a court of the Republic shall, regardless of whether or not the act constitutes an offence at the place of its commission, have jurisdiction in respect of that offence if the person to be charged-*

- (a) *is a citizen of the Republic;*
- (b) *is ordinarily resident in the Republic;*
- (c) *was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic at the time the offence was committed;*
- (d) *is a company, incorporated or registered as such under any law in the Republic; or*
- (e) *any body of persons, corporate or unincorporated, in the Republic."*

²⁹³ UNESCO Policy Paper No 14.5 (E) 60. In the recent 2018 Supreme Court of Appeal ("SCA") judgement in the matter of *Scholtz and Others v S*, the court confirmed that corruption is a serious offence of which the gravity of the crime is not to be forgotten in sentencing proceedings. In paragraph 197 of the judgement, the court reiterated that the legislation provides a minimum sentence (of fifteen years) that is only to be derogated from where circumstances are present "*which provide truly convincing reasons for a lesser sentence*". For the full discussion of the relevant law and development as applied by the courts, read paragraph 196 to 204 of the SCA judgement.

²⁹⁴ Section 26(1)(a) of the PCCA. These sentences are imposed for convictions of offences referred to in section 3 to 21 of the PCCA.

²⁹⁵ Kruger *Combating Human Trafficking* 449.

South Africa and supports South Africa's adoption of the Convention. POCA purposed to address criminal activities of an organised nature. POCA criminalises organised crime, money laundering, certain racketeering activities and activities of criminal gangs. The preamble acknowledges that POCA is drafted with the understanding that it is "*usually very difficult to prove the direct involvement of organised crime leaders*".²⁹⁶ POCA introduced a new paradigm, "*the purpose being to remove the incentive for crime, not to punish them*".²⁹⁷ POCA prohibits persons from benefiting from proceeds of unlawful activities and provides adequate provisions for the confiscation of such unlawful proceeds as well as for the restraint and recovery of property used in unlawful activities.²⁹⁸ Haynes comments that the low risk and high profits that the trafficking trade delivers is a main reason why criminal gangs pursue this offence.²⁹⁹

POCA defines "criminal gang" broadly as:

"any formal or informal ongoing organisation, association or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifying sign or symbol and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity."

The wide provision can thus be utilised against any association of people of three or more people aiming to conclude a crime. People conspiring to traffic victims, therefore, fall under the ambit of this act and can be prosecuted for crimes such as money laundering,³⁰⁰ managing an enterprise³⁰¹ and the acquisition, possession or use of proceeds from unlawful activities.³⁰² In *S v Sayed and Another* the court convicted the accused of money laundering, in terms of section 4 of POCA, managing an enterprise, in terms of section 2(1) of POCA as well as for the acquiring, usage or possession of proceeds of unlawful activities, prohibited in terms of section

²⁹⁶ Preamble of POCA. The preamble further provides:

"AND WHEREAS persons should not benefit from the fruits of organised crime and money laundering, legislation is necessary for the preservation and forfeiture of property which is concerned in the commission or suspected commission of an offence".

²⁹⁷ Ackermann J in *NDPP and Another v Mohamed and Others* 2002 2 SACR 196 (CC) 203-204 para 15-16.

²⁹⁸ Chapter 5 of POCA.

²⁹⁹ DF Haynes *Used, abused, arrested and deported: extending immigration benefits to protect the victims of trafficking and to secure the prosecution of traffickers* (2004) Hum Rts Q 221.

³⁰⁰ Section 4 of POCA.

³⁰¹ Section 2(1) of POCA.

³⁰² Section 6 of POCA.

6 of this act.³⁰³ Mr Sayed and his Thai co-accused trafficked and debt-bonded women from Thailand for purposes of sex work in a brothel in South Africa. In a similar case, the accused also trafficked women from Thailand for sex work.³⁰⁴ The women's passports were retained by their handlers until they had generated a sum of R60 000.00 by way of prostitution. In this matter, too, the court convicted the accused in terms of various offences under POCA.

As seen in these two cases, where traffickers profit from the illegal activities they subject victims too, POCA can effectively be implemented in prosecution of this benefit and, thereby, succeed in cutting of the income stream of the criminal gang and potentially eliminate at least certain role players in the organised crime gang by way of conviction. However, POCA's asset forfeiture, confiscation, restraint and civil recovery provisions have also been proven successful in eliminating the asset base of organised crime organisations.³⁰⁵ Where assets are used to commit the unlawful activity, POCA affords courts the right to confiscate such asset.³⁰⁶ In *National Director of Public Prosecutions v Geyser and Another* the court ruled that the immovable property owned by the accused, bought and renovated to be used as a brothel, was an instrumentality of the crime of which the accused was convicted, a contravention of section 2 of the Sexual Offences Act, and, as such, could be forfeited to the state.³⁰⁷ As POCA prohibits the acquisition, use or possession of proceeds from any unlawful activity, the asset forfeiture, restraint and confiscation powers of POCA can still be applied to accused convicted of crimes in terms of the Trafficking Act.³⁰⁸ POCA's provisions provide a two-pronged approach to asset recovery. Asset forfeiture or restraint can follow criminal conviction or civil proceedings, in which

³⁰³ *S v Sayed and Others*, case number: 041/2713/2008, Durban Regional Court, March 2010 (unreported).

³⁰⁴ *S v Mudaly and Others*, case number: 41/890/2007, Durban Regional Court.

³⁰⁵ Chapter 5 and 6 of POCA.

³⁰⁶ Section 18 of POCA provides the following in respect of confiscation orders:

"18. (1) *Whenever a defendant is convicted of an offence the court convicting the defendant may, on the application of the public prosecutor, enquire into any benefit which the defendant may have derived from—*

(a) that offence;

(b) any other offence of which the defendant has been convicted at the same trial; and

(c) any criminal activity which the court finds to be sufficiently related to those offences,

and if the court finds that the defendant has so benefited. the court may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for the payment to the State of any amount it considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order."

³⁰⁷ *National Director of Public Prosecutions v Geyser and Another* 2008 (2) SACR 103 (SCA) ("Geyser case") 16-17, 31, 36.

³⁰⁸ In the *Geyser* case the accused was convicted of an offence in terms of section 2 of the Sexual Offences Act and the immovable property that was found to be an instrumentality of that crime was forfeited in terms of the provisions of POCA.

case a conviction is not required, in terms of chapter 6 of POCA.³⁰⁹ The courts' powers in issuing restraint orders are also considered to be extensive in that POCA allows a court to issue such restraint prior to any conviction if reasonable grounds either that the property is an instrumentality of the crime the accused is facing charges to or reasonable grounds that a confiscation order will be made in respect of the property exist.³¹⁰ This Act has a wide and powerful scope to distort the income stream and asset base of organised criminal gangs that partake in trafficking of persons for profit purposes. The provisions of POCA should be used in conjunction with the Trafficking Act, and any other law in terms of which an accused may be convicted of an unlawful activity, in amplification of the paradigm shift in crime prevention as referred to by Ackermann J, by removing the profit incentive of the crimes.

4.3.13. National Health Act 61 of 2003

Trafficking of persons for the use of their body parts is an acknowledged form of trafficking both internationally and as a South African form of this crime.³¹¹ Although prior to the promulgation of the Trafficking Act, South Africa did not have legislation dealing specifically with the trafficking of human organs or other body parts, chapter 8 of the National Health Act 61 of 2003 ("National Health Act") prohibits the commercial trade in human organs and other body parts. The National Health Act repealed its predecessor the Human Tissue Act 65 of 1983 ("Human Tissue Act") which regulated the position in respect of human body parts prior to 2012. Following the coming into operation of the final provisions of chapter 8 of the National Health Act on 1 March 2012, substantive regulations to this chapter were published on 2 March 2012.³¹² Together with the regulations, chapter 8 of the National Health Act creates a framework of requirements for the legal donation and transplantation of any and all human tissue, gametes, blood or blood products.³¹³ This Act provides that human tissue, gametes, blood or blood products may only be removed from a living person where such person has consented to such removal in writing

³⁰⁹ The constitutionality of these provisions has been questioned as such civil recovery amounts to potential grave infringement of the constitutionally enshrined right to property which may only be legally limited in terms of a law of general application. Mollema *Combating Human Trafficking in South Africa* 437.

³¹⁰ Section 25 and 51 of POCA.

³¹¹ UN.GIFT the Vienna Forum to Fight Human Trafficking *Vienna Austria Background Paper Workshop 011: Trafficking In Persons For The Purpose Of Organ Removal* (13-15 February 2008) 2; UNODC *Toolkit: Trafficking in Persons for the Purpose of Organ Removal* (2015) 22; SA Law Reform Commission *Project 131 Trafficking in Persons Report* 3.

³¹² The provisions of chapter 8 of the National Health Act came into effect as follows: section 53 came into force on 30 June 2008, sections 55, 56 and 68 on 17 May 2012, and the remaining sections 54 and 57 to 67 were enacted on 1 March 2012; MS Pepper "Enactment of Chapter 8 of the National Health Act and regulations thereto" (2012) 5(1) South African Journal of Bioethics and Law <<http://www.sajbl.org.za/index.php/sajbl/article/view/201/206>> (accessed 22 April 2019).

³¹³ Mollema *Combating Human Trafficking in South Africa* 458.

and in accordance with the prescribed conditions.³¹⁴ Section 58 and 59 further dictate that body parts may only be removed by a medical practitioner or dentist in a hospital or authorised institution and only where another medical practitioner has provided written consent for such removal. Where a person has been forced by a trafficker to have an organ removed without the written consent of this person, whether in a hospital or not, the removal of that body part constitutes a breach of the provisions of the National Health Act. Furthermore, section 60(4) and (5) of this act provides:

- “(4) *It is an offence for a person-*
- (a) *who has donated tissue, a gamete, blood or a blood product to receive any form of financial or other reward for such donation, except for the reimbursement of reasonable costs incurred by him or her to provide such donation; and for in this Chapter.*
 - (b) *to sell or trade in tissue, gametes, blood or blood products, except as is provided for in this Chapter.*
- (5) *Any person convicted of an offence in terms of subsection (4) is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.”*

Where a person sells or trades in these organs or body parts whether the individual providing the organ has consented to such removal in writing or not and whether all the other regulations or requirements are met, such persons can be prosecuted in terms of section 60(5) of the National Health Act. Section 61(3) requires written ministerial consent for transplantations of organs into persons that are not South African citizens or permanent residents. In the case of *S v Netcare Kwa-Zulu Proprietary Limited* in which judgement was handed down on 8 November 2010 in the Durban Regional Court, the private company, the chief executive officer and eight others pleaded guilty and were convicted on 102 charges related to illegal kidney transplants that took place under an illegal scheme facilitated by the private hospital group.³¹⁵ The convictions were secured in terms of chapter 2 of the Human Tissue Act, the predecessor of the National Health Act. In this instance, a broker sourced kidney suppliers from Israel, Romania and Brazil for transplants to be done on Israeli patients. The Israeli patients would be brought to South Africa where the procedure would be conducted in a Netcare facility in Kwa-Zulu Natal. The patients and donors were to sign consenting documents which falsely indicated that the donor and receiver were related in order to circumvent the requirement of ministerial consent in cases of unrelated parties. It is submitted that this scheme would fall wholly within the ambit of the Trafficking Act in which case severe imprisonment sentences would have been imposable. However, based on the US report on trafficking in persons in South Africa for 2018, it can be

³¹⁴ Section 55(a) of the National Health Act.

³¹⁵ *S v Netcare Kwa-Zulu Proprietary Limited*, case number: 41/1804/2010, Durban Regional Court (Netcare case).

argued that the prison sentences provided for in the National Health Act, amounting to a maximum of five years imprisonment which can be accompanied by a fine, will not be seen as a satisfactory punishment for crimes of this nature.³¹⁶ It is worth noting that the provisions do provide for substantial fines to be imposed as no maximum fine is prescribed.³¹⁷

The National Health Act also prohibits the use of organs or body parts of dead persons for purposes other than research, training, advancing of health sciences or for therapeutic purposes.³¹⁸

In both instances of organs or body parts removed from living or deceased persons, the receiving of “payment” for such organs is prohibited. The only consideration that may be provided is that for the reasonable cost involved in the importation, export, acquisition or supply of the organ or body part.³¹⁹ The medical practitioner conducting the transplantation may also be remunerated for services rendered in respect of the transplant operation.³²⁰

A concern raised by Kruger in respect of the National Health Act is that the possession of body parts is not criminalised by this act. She points out that the Act does not provide assistance in cases where a person is found in possession of, for example, human organs, genitals or other body parts but the evidence cannot prove that such person has killed the person whose organs it was or that the possessor has the intention of selling these organs.³²¹

The *Netcare* case is an excellent example of how the National Health Act can be utilised in prosecution of trafficking for purposes of generating a profit from human body parts. Where elements of the crime of trafficking in persons as provided for in the Trafficking Act cannot be established beyond reasonable doubt, the offences created by the National Health Act will be an adequate alternative charge. Besides, for the concerns in respect of sentencing and the criminalising of the possession of body parts, the National Health Act still remains a potent weapon to curb trafficking of human body parts in and around South Africa.

³¹⁶ Kruger *Combating Human Trafficking* 459.

³¹⁷ In the *Netcare* case the court imposed a fine of R3 800 000.00 on the Netcare hospital group, equalling the benefit stemming from the scheme’s operations, and a further R4 020 000.00 for each of the 102 counts on which the group pleaded guilty; UNODC case law database <https://sherloc.unodc.org/cld/case-law-doc/traffickingpersons/crimetype/zaf/2010/state_v._netcare_kwa-zulu_limited.html> (accessed 22 April 2019). The Human Tissue Act provided for a maximum imprisonment of one year. The National Health Act increased the maximum to five years imprisonment while further not providing a limit in respect of fines that can be imposed for offences under chapter 8.

³¹⁸ Section 64 of the National Health Act.

³¹⁹ Section 60(2) of the National Health Act.

³²⁰ Section 60(3) of the National Health Act.

³²¹ Kruger *Combating Human Trafficking* 459.

4.3.14. Films and Publications Act 65 of 1996

The Films and Publications Act 65 of 1996 ("FPA") regulates the production, distribution, possession and classification of specific publications, games and films.³²² In terms of this Act, certain publications, games and films must be submitted to the Film and Publication Board for classification, which classification will determine whether the publication, game or film may be distributed or whether it must be accompanied with an age restriction or other notice or consumer advice in respect thereof.³²³ Any publication, game or film containing child pornography shall be refused by the board and must be referred to a police official for further investigation.³²⁴ The showing of such refused publication is an offence in terms of the FPA and can be liable to a fine and imprisonment not exceeding five years.³²⁵ The FPA further criminalises the unlawful possession, creation, production, assisting in the creation or production, import of or any distribution, export or who makes available any publication, game or film that contains child pornography or that encourages, promotes or advertises child pornography or the sexual exploitation of children.³²⁶ The FPA also imposes an obligation to report a suspicion that any person is involved in the distribution of or in possession of child pornography.³²⁷ This Act further criminalises the facilitation of a financial transaction that will result in the distribution of child pornography.³²⁸ The provisions of the FPA in respect of child

³²² The Films and Publications Act 65 of 1996 has been amended by the Films and Publications Amendment Acts of 1999, 2004 and 2009. A further Films and Publications Amendment Bill has been approved by the South African National Assembly and National Council of Provinces and is awaiting the President's signature to be promulgated into law since 19 March 2019.

³²³ Section 16 and 18 of the FPA.

³²⁴ Sections 16(4)(a), 16(6), 18(3)(a) and 18(5) of the FPA.

³²⁵ Section 24A(2) of the FPA.

³²⁶ "24B. *Prohibition, offences and penalties on possession of films, games and publications.*—(1) Any person who—

- (a) *unlawfully possesses;*
- (b) *creates, produces or in any way contributes to, or assists in the creation or production of;*
- (c) *imports or in any way takes steps to procure, obtain or access or in any way knowingly assists in, or facilitates the importation, procurement, obtaining or accessing of; or*
- (d) *knowingly makes available, exports, broadcasts or in any way distributes or causes to be made available, exported, broadcast or distributed or assists in making available, exporting, broadcasting or distributing, any film, game or publication which contains depictions, descriptions or scenes of child pornography or which advocates, advertises, encourages or promotes child pornography or the sexual exploitation of children,*

shall be guilty of an offence."

³²⁷ Section 24B(2) of the FPA.

³²⁸ Section 24B(3) provides:

"(3) Any person who processes, facilitates or attempts to process or facilitate a financial transaction, knowing that such transaction will facilitate access to, or the distribution or possession of, child pornography, shall be guilty of an offence."

pornography are thus couched in very wide terms to prohibit almost any involvement in child pornography from mere possession to distribution thereof. Where a trafficker subjects child victims to sexual acts in production of child pornography, prosecution in terms of the FPA is possible. Subjecting child victims to the forced viewing of pornography or other refused publications for purposes of grooming them for sexual acts can also be prosecuted in terms of the provisions against possession of child pornography.³²⁹ Traffickers often make use of social media platforms to lure and groom child victims. Although these relationships generally start off unsuspectingly and are focused on obtaining the victim's trust, they often develop into platforms for the trafficker to groom, and later involve, their victim in sexual acts. The latest proposed amendment to the FPA specifically seeks to include social media and online internet publications within the ambit of the FPA. The amendment will prohibit the distribution of private sexual photographs or films.³³⁰ The amended FPA will further wholly prohibit the filming and distribution of films and photographs depicting sexual violence and violence against children.³³¹ Where a trafficker has posted a private sexual photograph or film or any photograph or film depicting child pornography or sexual violence on social media the amendment provides that the internet service provider through which such publication was made, will be compelled to provide the publicised material to the board or the South African police services.³³² The amendment Act further clarifies that the FPA has as object to "*criminalise the possession, production and distribution of child pornography*" by inserting this as an explicit object of the Act as section 2(d) of the FPA.³³³ The amendment bill further provides more stringent sentences to be imposed than are currently provided in the FPA. For the offences in respect of child pornography a maximum penalty of 10 years for first convictions and 15 years for second and

³²⁹ The 2009 Films and Publications Amendment Act amended the FPA provisions that stipulate the objects of the act to explicitly provide that the protection of children from exposure to certain harmful materials is an object of the act. Section 2(b) of the FPA now provides that the act has as one of its objects to "*protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences*".

³³⁰ Clause 18F of the Films and Publications Amendment Bill provides:

"Prohibition against distribution of private sexual photographs and films

"18F. (1) No person may expose, through any medium, including the internet and social media, a private sexual photograph or film if the disclosure is made—

(a) without the consent of the individual or individuals who appear in the photograph or film; and

(b) with the intention of causing that individual harm."

³³¹ Clause 18G of the Films and Publications Amendment Bill provides:

"18G. (1) No person may create, produce or distribute in any medium, including the internet, and social media any films or photographs depicting sexual violence and violence against children."

³³² Clause 18F(6) and 18G(7) of the Films and Publications Amendment Bill.

³³³ Clause 3 of the Films and Publications Amendment Bill.

consequent convictions.³³⁴ It is submitted that these penalties match the seriousness of the offences.³³⁵ The penalties in respect of the publication of private sexual photographs or films or in respect of the publication of photographs or films depicting sexual violence against children, two years of imprisonment which can be coupled with a fine of up to R150 000.00 is suggested.³³⁶ The provisions of the FPA, and even more so if the amendment bill be accepted, provide the prosecution with further legal provisions in terms of which to prosecute traffickers. This Act can play a role in halting trafficking in its beginning stages where a perpetrator is grooming a victim by way of sexual photographs via social media, where a child victim is subjected to or coerced into sexual acts in production of pornographic content or where a trafficker threatens victims with supplying their family with photographs or films of them performing sexual acts. As this Act criminalises the mere possession of the prohibited content, it can be helpful in ensuring convictions in cases where the evidentiary burden of the Trafficking Act is insurmountable.

4.3.15. Basic Conditions of Employment Act 75 of 1997

The Basic Conditions of Employment Act 75 of 1997 (“BCEA”) determines the minimum standard of fair labour practices, employee rights and employer obligations. Subject to the Constitution, section 48(1) of the BCEA prohibits any forced labour. Section 48(2) further provides that:

“No person may for his or her own benefit or for the benefit of someone else, cause, demand or impose forced labour in contravention of subsection (1).”

Section 48(3) dictates that contravention of section 48(1) and (2) is an offence. To the extent that victims have been trafficked and subjected to forced labour, the BCEA provisions can be employed in prosecution of such offenders. Section 43 of the BCEA further specifically prohibits requiring a child under the age of 15 years or, should these differ, under the minimum legal school-leaving age from being required or permitted to work.³³⁷

³³⁴ Clause 25 of the Films and Publications Amendment Bill.

³³⁵ Kruger & Oosthuizen (2012) *PER/PELJ* 310.

³³⁶ Clause 27 of the Films and Publications Amendment Bill.

³³⁷ Section 43 of the BCEA reads:

- “(1) Subject to section 50(2)(b), a person must not require or permit a child to work, if the child—
- (a) is under 15 years of age; or
 - (b) is under the minimum school-leaving age in terms of any law.
- (2) A person must not require or permit a child to perform any work or provide any services—
- (a) that are inappropriate for a person of that age;
 - (b) that place at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development.

These provisions are helpful, as securing a conviction would not require the prosecution to prove that the victims were actually trafficked meaning that elements constituting the full trafficking process need not be proven. As such, it is an effective alternative charge to a charge of trafficking in persons.

4.3.16. International Cooperation in Criminal Matters Act 75 of 1996

The International Cooperation in Criminal Matters Act 75 of 1996 ("International Cooperation Act") provides legislative measures by way of which states can judicially cooperate, beyond the framework of extradition, in respect of provision of evidence and the execution of sentences in criminal matters as well as in the confiscation and transfer of crime proceeds between such states. As trafficking is a transnational crime in which the places of origin, transit and destination in the trafficking cycle often differ, the provisions of this act can be of great assistance in matters that transpire across state borders. Chapter 2 of the act provides that a South African court hearing a matter can request the assistance of another state in the obtaining of evidence in the prescribed circumstances.³³⁸ These provisions provide that where it is in the interest of justice a letter of request may be made in order to obtain the statement or other evidence of a witness that is present in the foreign state.³³⁹ Section 12 of the International Cooperation Act affords witnesses from foreign states that appear in South Africa for purposes of testimony the security that they will not be arrested in the Republic. This provision can assist the prosecution in assuring foreign trafficking victims that could be facing related charges in South Africa, such as a charge of prostitution, that they will not be arrested whilst testifying against the perpetrator.³⁴⁰

The Act further provides for judicial cooperation in the execution of sentences and compensatory orders.³⁴¹ Where a person is convicted and sentenced to a fine or compensation which he or she will not be able to satisfy with property within South Africa and such person possesses foreign property that could be utilised in paying the fine or compensation order, the court may issue a letter of request to the foreign state in which the property is held requesting

(3) *A person who requires or permits a child to work in contravention of subsection (1) or (2) commits an offence.*

³³⁸ Section 1(1) and 1(2) of the International Cooperation Act.

³³⁹ Section 1(1) and 1(2) of the International Cooperation Act.

³⁴⁰ Section 12 of the International Cooperation Act provides:

"12. *No witness residing in a foreign State and who attends a court or tribunal in the Republic shall, while so attending, be liable to be arrested in the Republic on any civil warrant for debt or on a criminal charge for the commission of an offence incurred or allegedly committed in the Republic, before his or her arrival in the Republic for the purpose of his or her attendance of such court or tribunal.*"

³⁴¹ Chapter 3 of the International Cooperation Act.

the assistance of the foreign state in this regard.³⁴² Similarly, where a court has made a confiscation order which will not be satisfied by the offender's property in South Africa and the court is convinced that the offender holds property in a foreign state that can be used to fulfil the compensation order, the court may issue a letter of request to the foreign state in which the property is held in order to obtain their assistance in executing the compensation order.³⁴³ These provisions can specifically be of great assistance in executing judgements against international crime syndicates that do not hold sufficient property to satisfy the judgement in South Africa.³⁴⁴ The International Cooperation Act will, therefore, provide assistance to prosecutors and the judiciary in securing justice in human trafficking cases where victims or other witnesses are not present in South Africa and where the offenders only have executable property abroad.³⁴⁵

4.4. Suggestions

It is clear that the South African law provides a wide array of means to combat the offence of trafficking in persons. These means consist of both common law and statutory offences that criminalise either acts or omissions that form essential elements of or are closely related to the commission of the crime of trafficking in persons as defined in the Palermo Protocol, and, recently, in the Trafficking Act. Prior to promulgation of the Trafficking Act and its broader definition of the trafficking in persons crime, the interim provisions provided for in the Sexual Offences Amendment Act and Children's Act aptly criminalised certain acts of trafficking. However, these instances were limited to cases of trafficking for purposes of sexual exploitation or where the victim was a minor. These were not sufficient to meet the international legislative requirements. The criminalisation of the whole required offence of trafficking in persons and the full process that it entails remains unaccounted for in South African law without the Trafficking Act. Although promulgation of comprehensive anti-trafficking legislation in the form of the Trafficking Act usurps the historic role that these common and statutory offences have played in the combat of trafficking in persons in South Africa, the role of these crimes is by no means to be considered negated. Instead, this study shows that these fragmented and differing crimes should still remain an integral part of South Africa's efforts to curb the trafficking crime. In this regard, the following suggestions are made:

³⁴² Section 13 of the International Cooperation Act.

³⁴³ Chapter 4 of the International Cooperation Act.

³⁴⁴ Kruger *Combating Human Trafficking* 475.

³⁴⁵ Kruger *Combating Human Trafficking* 475; Mollema *Combating Human Trafficking in South Africa* 443-444.

4.4.1. **Alternative charges**

The evidentiary burden in proving all the elements that constitute the trafficking crime is high. It is suggested that the relevant common law or statutory crime/s, as discussed above, that could be applicable in each specific case be put to the accused as formal alternative charge to that of trafficking in persons in terms of the Trafficking Act. These alternative charges can often be identified as the underlying or constituent parts or phases of the trafficking cycle. These acts or omissions often represent one of the elements of the trafficking offence: the prohibited action, prohibited means or exploitation. Crimes that can be used as alternative charge in this manner are crimes such as abduction, kidnapping, assault, murder, sexual assault, rape, fraud, extortion, *crimen iniuria*, criminal defamation, domestic violence, breach of the Identification Act, Intimidation Act, Sexual Offences Act, Sexual Offences Amendment Act (such as brothel-keeping or benefiting of the proceeds of a brothel-keeping), breach of the Children's Act, of the PCCA, POCA, the National Health Act or the BCEA.³⁴⁶

4.4.2. **Additional charges**

Where it will not lead to an unlawful duplication of charges, breach of the relevant statutes and commission of relevant common law crimes should also be put to the accused as additional charges over and above the charge of a breach of the Trafficking Act. This will ensure that offenders are faced with the full force of the law and ensure South Africa fulfil its international obligation to not only promulgate comprehensive anti-trafficking legislation but also combat such trafficking in persons by use of the full of force of the available legal measures.³⁴⁷ As set out above, the crimes that could be utilised as additional charges offences in terms of the Identification Act, the Immigration Act, the Films and Publications Act, the PCCA, POCA, the Drug and Drug Trafficking Act, charges of corruption, fraud, common law related drug charges and any other related charges.

4.4.3. **Procedural assistance**

Certain of these laws contain provisions that regulate evidentiary and other procedural measures that can assist in the effective combat and deterrence of trafficking. The International Cooperation Act remains an important assistive statute to obtain evidence from persons, notably witnesses, victims, both or even accused, which are physically present in another jurisdiction.³⁴⁸ This Act should also be used to ensure imposed sentences are effected on accused that are

³⁴⁶ For examples of how these acts or crimes can be used as alternative charge refer to the earlier paragraphs of Chapter 4 above.

³⁴⁷ Kruger & Oosthuizen (2012) *PER/PELJ* 326.

³⁴⁸ Section 2 of the International Cooperation Act.

not present in South Africa or that do not have sufficient property in South Africa to satisfy a sentence.³⁴⁹ The literature confirms that the international cross-border trafficking of persons by organised criminal groups is a growing lucrative industry. This act provides the prosecution with a farther reach in order to prohibit this industry from further prevalence in South Africa by providing measures by which evidence can still be obtained from persons in foreign states and through which sentences can still be executed against foreign property of convicted accused. In this regard, the comprehensive civil and criminal asset forfeiture, confiscation or restraint provisions must also be applied by prosecutors and courts alike in relevant circumstances.³⁵⁰ Not all of the common law or statutory crimes discussed in this chapter can be prosecuted extra-territorially. Where extra-territorial jurisdiction is provided, those offences must be noted as possible alternative or additional charges to combat trafficking. For example, the extra-territorial jurisdiction provided by the PCCA can further extend the prosecutorial arm in respect of corrupt criminal activities. As corrupt crimes often form part of the trafficking cycle, it is suggested that the application of this act be considered when charges are instituted in order to ensure possible charges in terms of the PCCA are not neglected. It is further suggested that where compensation is not possible in terms of other means, section 300 of the Criminal Procedure Act 51 of 1977 ("CPA") must be utilised to compensate victims and so be a further punitive and deterrent impact on perpetrators. These are imperative measures that must be utilised to strengthen the South African strategy to curb cross-border organised trafficking.

4.4.4. General comments

The following general suggestions are made:

1. In cases of trafficking of children or mentally disabled persons for the purpose of sexual exploitation, it is suggested that alternative or additional charges of contravening the relevant Sexual Offences Amendment Act, if applicable, be put to the accused over and above the main counts of in terms of the Trafficking in Persons Act. Should conviction in terms of the Sexual Offences Act, either as addition to a Trafficking Act offence or as an alternative charge, entail conviction, this will ensure that the convicted perpetrator be added to the National Register for Sexual Offenders in terms of section 42 of the Sexual Offences Amendment Act.³⁵¹
2. The Immigration Act must be applied with great caution to ensure that trafficked victims are not deported in contravention of the international requirements to assist such victims. As

³⁴⁹ Section 13 and Chapter 4 of the International Cooperation Act.

³⁵⁰ Chapter 5 and 6 of POCA.

³⁵¹ Chapter 6 of the Sexual Offences Amendment Act regulates how this register will be maintained and regulated.

such, it is suggested that the Immigration Act be amended to provide for the specific treatment of foreign victims of trafficking. Failing such amendment, South Africa is in breach of the international requirement to protect and assist victims, specifically to not summarily repatriate such victims.³⁵²

3. The National Health Act should be amended to provide for stricter penalty provisions. It is submitted that a maximum of five years imprisonment could be totally inappropriate in certain instances.
4. Internationally, prosecutions in South Africa are seen as “rare and fraught with difficulties”.³⁵³ Consequently, the risk of being prosecuted for human trafficking in South Africa is seen as low. Prosecution in terms of the known statutory and common law offences have proven effective in curbing the trafficking offence. As such, it could also prove valuable to utilise these known alternatives until the South African legal fraternity and, specifically, the prosecutorial authorities become accustomed with the newly defined crime and practicalities in the application of the new legislation have been ironed out.³⁵⁴

As such, the role of the common law and statutory crimes in the combat and conquer of trafficking in persons have not diminished but, rather, have shifted in form and remain a vital part of South Africa’s combat and prevention of trafficking in persons initiatives.

4.5. Conclusion

It is submitted that the existing South African statutory crimes can be an additional aid in prosecuting trafficking in persons and related crimes and very helpful in prohibiting crucial phases of the multi-faceted trafficking process. This chapter has shown, that these offences are particularly useful in achieving South Africa’s international obligation to prevent and combat trafficking in persons and, specifically, in fulfilling the requirement to “adopt legislative and other measures” to criminalise the acts of trafficking in persons as internationally defined in the Palermo Protocol.³⁵⁵ As set out above, these provisions have also proven effective in obtaining relevant convictions in matters such as the *Sayed*, *Sawatkan*, *Andrews*, *Dos Santos* and *Jezile*

³⁵² It was expected that the Trafficking in Persons Act would remedy the position by providing that victims of trafficking are not to be prosecuted for crimes that arise from their being trafficked such as being illegally present in South Africa. However, the Trafficking in Persons Act fail to address this situation leaving South Africa in breach of the international requirements instituted by the Palermo Protocol. The South African legislature will, therefore, have to provide interim measures whilst amending or amend the provisions of the Trafficking in Persons Act and the Immigration Act to provide these read concurrently.

³⁵³ UNESCO Policy Paper No 14.5 (E) 26.

³⁵⁴ 26.

³⁵⁵ Article 5(1) of the Palermo Protocol.

cases. Three ways in which these crimes are of such assistance are highlighted. The first and very crucial manner is where prosecution of these statutory and common law offences is effectively structured to cut off certain arteries feeding the main process of trafficking by eliminating the ability of a specific cycle of trafficking to function in the same manner. As illustrated in this chapter, many of these offences constitute separate parts of the trafficking cycle each forming a necessary link in the achieving of the trafficking crime. By removing one such link, the whole cycle could be inhibited. The second discussed manner in which these statutory and common law crimes can be used is as an alternative charge to that of trafficking in persons in terms of the Trafficking in Persons Act. This chapter shows how prosecution even of certain “less serious” crimes must also be implemented in order to ensure that convictions can still be secured where all of the elements of the trafficking offence cannot be proven beyond reasonable doubt in a court of law. This could also be of great importance where the practical application of the Trafficking in Persons Act is still ironed out. The third manner in which the existing crimes are to be applied by prosecutors and other law enforcers is as an additional separate charge in cases where the offences are different and do not constitute a duplication of charges. This will ensure that offenders are met with the full force of the law and punished accordingly. Such a stringent approach will assist South Africa in meeting its international requirement of combating human trafficking. However, it must be borne in mind that these common law and statutory crimes are not sufficient to meet all international obligations and promulgation together with successful prosecution of trafficking in persons under the Trafficking Act is critical in ensuring South African law contains adequate measures to effectively prosecute trafficking as it is internationally required to.³⁵⁶

³⁵⁶ Kruger & Oosthuizen (2012) *PER/PELJ* 326.

5. The new South African legal framework regulated by the Prevention and Combating of Trafficking in Persons Act (and how it compares to the required international system)

5.1. Introduction

In anticipation of the coming into effect of the Trafficking Act, South Africa has utilised its existing legal framework to prosecute trafficking crimes.³⁵⁷ By charging offenders with common law crimes, statutory offences and the specific interim trafficking provisions, convictions have been achieved.³⁵⁸ However, certain international obligations were still not met and trafficking in its full form could not be brought to book under the pre-Trafficking Act dispensation. The need for all-inclusive legislation remained.³⁵⁹ This chapter will consider the new legal framework post-commencement of the Trafficking Act, the changes it brings about and whether it remedies the shortcomings of the prior position. The statutory definition created by the new act will be analysed to evaluate whether it is a comprehensive definition based on international definitions and within the South African context. The elements, with exception to the element of *mens rea* provided for by the Act that will be discussed in a consequent chapter, will be critically considered. This chapter will specifically study the Trafficking Act to establish which acts are criminalised by the Prevention and Combating of Trafficking in Persons Act.

Trafficking, known as an integrated process, consist of acts divergent in nature. These acts differ with regards to the seriousness of the offence and the contact with the trafficked person. The compilation of these acts under the prosecuting mandate of the Trafficking Act ensures that these acts not escape prosecution as a serious offence. In light of this, this chapter will further analyse the Trafficking Act's criminalisation clauses to determine the scope and extent of the act's preventative powers. Section 4, the general criminalisation clause, will be examined. The derivative offences created by chapter 2, specifically sections 5 to 11 will also be studied. The other acts criminalised by the Act that entertains lesser forms of fault will be analysed as to

³⁵⁷ Kruger & Oosthuizen (2012) 15(1) PER/PELJ, 325.

³⁵⁸ *S v Sawatkan* unreported case number: 41/2045/08, Durban in which the accused was convicted in terms of the Sexual Offences Act 23 of 1957; *S v Wiphatawaithaya* unreported case number: 317/2/09, Durban in which the accused was also convicted in terms of the Sexual Offences Act 23 of 1957; *S v Eloff* unreported case number: SH599/08 Welkom in which case the accused was convicted in terms of the Sexual Offences Amendment Act 32 of 2007; *S v Amien Andrews; Dos Santos v S* 2018 1 SACR 20 (GP); *Jezile v S and Others* 2016 2 SA 62 (WCC); Kruger & Oosthuizen (2012) PER / PELJ 325-326.

³⁵⁹ LB Najemy *South Africa's Approach to the Global Human Trafficking Crisis: An Analysis of the Proposed Legislation and the Prospects of Implementation* 13 <https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1044&context=law_globalstudies> (accessed 26 November 2018); R Cave *A Critical Analysis of Human Trafficking in South Africa: Remedies and Recommendations* Student Working Paper University of Notre Dame (2016).

establish their extent and proficiency. The statutory presumption of actual and reasonable knowledge created by the Act and its effect on the crime's prosecution will also be examined. Furthermore, this chapter will consider the effect of the commencement of the act on current South African customary law practices, such as *ukuthwala*. The life expectation of these practices will be discussed in light of the Act's criminalisation of specific acts.

5.2. Trafficking in Persons Act

The Trafficking Act is the legislation promulgated in accordance with South Africa's international legal obligation set out in article 5 of the Palermo Protocol. In order to fulfil both the mandate to combat and prevent trafficking, the Trafficking Act creates the prosecutable crime of trafficking in persons (section 4(1)) and further criminalises related crimes, such as debt bondage (section 5), possession, destruction, confiscation, concealment of or tampering with documents (section 6), making use of the services of trafficking victims (section 7) and partaking in conduct that facilitates the trafficking in persons (section 8). These crimes will be considered below so as to determine whether South Africa meets its international obligation to criminalise certain crimes, especially trafficking in persons, the obligation to protect and assist victims and to prevent trafficking in persons.

5.2.1. The obligation to criminalise

Article 5 of the Palermo Protocol requires each state party that has ratified the Protocol to promulgate legislation in order to criminalise the conduct set forth in article 3 of the Protocol. The definition that the South African Trafficking Act incorporates will be considered in order to determine whether it complies with the article 5 requirement.

5.2.2. "Trafficking in persons" definition

Section 4(1) of the Trafficking Act sets out the definition of "trafficking in persons" for purposes of the Act:

"Trafficking in persons

4. (1) Any person who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic, by means of—

(a) a threat of harm;

(b) the threat or use of force or other forms of coercion;

(c) the abuse of vulnerability;

(d) fraud;

- (e) *deception;*
- (f) *abduction;*
- (g) *kidnapping;*
- (h) *the abuse of power;*
- (i) *the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or*
- (j) *the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage,*
aimed at either the person or an immediate family member of that person or any other person in close relationship to that person, for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons.”

As the Palermo Protocol requires three elements to be present in the definition of the domestic legislation, the Trafficking Act definition must contain the same three elements of: prohibited action, prohibited means and exploitation.

5.2.2.1. The prohibited actions

The following actions are prohibited by the section 4(1) definition: the delivery, recruitment, transport, transfer, harbour, sale, exchange, lease or receipt of another person within or across the borders of the Republic. These actions almost mirror the Protocol's definition. The South African definition, however, include the further actions of delivery, sale, exchange and receipt of another person.³⁶⁰ It can be argued that “delivery” would form part of the action to “transport”³⁶¹ or “transfer”³⁶² and, as such, explicit inclusion thereof is not necessary. However, the inclusion of “delivery”, being the opposite of “receipt” (which action is explicitly included) is not harmful, but adds value to the combatting of the crime by providing legal certainty and serving the *ius certum* and *ius acceptum* legality principles. Due to the fact that trafficking is a fragmented process crime,³⁶³ such inclusion might well serve to negate any argument on the point of whether an action of mere delivery of an individual as part of the trafficking of such individual can be prosecuted. The further actions of selling, exchanging or leasing of persons have also been added to the Palermo Protocol prohibited actions broadening the South African definition. It is submitted that this inclusion is a welcome broadening of the trafficking crime. It provides that an offender that is not necessarily involved in the recruitment, transport or harbouring of the

³⁶⁰ Section 4(1) of the Trafficking Act.

³⁶¹ The Oxford Living Dictionaries definition of “transport”: “Take or carry (people or goods) from one place to another by means of a vehicle, aircraft, or ship.” <<https://en.oxforddictionaries.com/definition/transport>> (accessed 26 November 2018).

³⁶² The Oxford Living Dictionaries definition of “transfer”: “Move from one place to another.” <<https://en.oxforddictionaries.com/definition/transfer>> (accessed 26 November 2018).

³⁶³ Kruger & Oosthuizen (2011) SAJ 46-66.

trafficking victim, but an agent or middleman brokering the sale or exchange of the victim, can, with greater ease, be prosecuted under this crime. This is in line with the domestic definitions of other states such as Israel and Belarus.³⁶⁴ Mollema suggests that as sale, lease and exchange all relate to the concept of exchanging a commodity for a benefit, that it might be beneficial for legal certainty to group these actions in a single term.³⁶⁵ However, the inclusion of all three terms serves to improve legal certainty and ensures all these actions are clearly prohibited. It is submitted these are wise inclusions that serve to prove the cognisant effort taken by South Africa in not just meeting its international obligations but effectively combatting this crime.

5.2.2.2. The prohibited means

The following methods are prescribed by the Trafficking Act:

“by means of—

- (a) a threat of harm;*
- (b) the threat or use of force or other forms of coercion;*
- (c) the abuse of vulnerability;*
- (d) fraud;*
- (e) deception;*
- (f) abduction;*
- (g) kidnapping;*
- (h) the abuse of power;*
- (i) the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or*
- (j) the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage,*
aimed at either the person or an immediate family member of that person or any other person in close relationship to that person,”

Similar to the Palermo Protocol, the Trafficking Act's prohibited means can also be categorised into the three categories of force, deception and abuse of power or a position of vulnerability.

³⁶⁴ The various definitions are referred to in article 8 of the Model Law: *“anyone who carries on a transaction in another person”* Israel, Penal Code, article 377A; *“actions intended to sell or purchase or undertake other types of activities regarding turning over or obtaining a dependent person”*, Belarus, article 181 of the Criminal Code, as amended by Law No. 227-3 on Changes to the Criminal Code and Criminal Procedure Code (22 July 2003);

³⁶⁵ Mollema *Combating Human Trafficking in South Africa* 465.

5.2.2.2.1. **Force**

The Protocol prescribes “the threat or use of force or other forms of coercion”. The Trafficking Act complies with this definition by likewise prohibiting this conduct and all the other listed Protocol means. The Trafficking Act goes further than the Palermo Protocol by adding as prescribed means a threat of harm to a person and kidnapping. Similar to the Palermo Protocol, the Trafficking Act does not provide a definition for “force” and the ordinary meaning should be used in interpreting the word. The Palermo Protocol requires a broad interpretation of “force” rendering a wide array of acts barred.³⁶⁶ South Africa is obligated to likewise import a broad meaning for the word “force”. The Trafficking Act does not limit the meaning of “force” and, as such, complies with the internationally prescribed definition in this regard. Similarly, the meaning of “coercion” is not defined by the Protocol or Trafficking Act. A broad interpretation is correspondingly ascribed to the word by maintaining the protocol wording in line with the protocol’s requirements.

5.2.2.2.2. **Deception**

The Palermo Protocol includes fraud and deception as prohibited methods in its trafficking definition. South Africa does the same in its national criminalising provision. As is the case in the Protocol, the term “deception” is undefined in the South African legislation. Therefore, the ordinary meaning of the word will be ascribed to it. As the Palermo Protocol does not define and limit the ambit of “deception”, South Africa meets its minimum international duty by similarly providing for the widest scope of the “deception” term. As “deception” is a clear concept and does not represent a specifically defined term in South African law, it is not envisaged that uncertainty or dispute in respect of the term “deception” should exist. As such, it should not be necessary to include a definition of “deception” that is specific to trafficking. In accordance with the international prescripts, “deception” must be widely interpreted and providing a definition where the ordinary meaning suffices could unnecessarily limit the scope of the term.³⁶⁷

5.2.2.2.3. **Abuse of power or of vulnerability**

The Palermo Protocol requires prohibition of 1) the abuse of power, 2) of a position of vulnerability and 3) of the usage of any of the prohibited means, with specific inclusion of the giving or receiving of benefits, to obtain the consent of a person who has control over another for the trafficking of that other person. The Trafficking Act complies by prohibiting these

³⁶⁶ Refer to discussion under 2.1.2.2.1.4.1.

³⁶⁷ In support with the discussed approach, the Model Law also does not prescribe a “deception” definition specific to the trafficking context but provides a basic definition which mirrors the ordinary meaning of the word.

methods. The new Act further provides a definition for “abuse of vulnerability”. Although the Palermo Protocol did not prescribe a definition, leaving it up to the member state to determine a definition that would be suitable in each state’s jurisdiction, the Model Law suggests such definition be provided as problems have been experienced in application of the undefined concept in practice.³⁶⁸ The Model Law suggested definition refers to the official interpretative note on the definition as included in the *Travaux Préparatoires* which explains that the reference to the abuse of a position of vulnerability is to “*be understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved*”³⁶⁹. It indicates that member states can further add a relevant list of factors that will result in the abuse of such position of vulnerability. South Africa’s definition reads as follows:

“abuse of vulnerability” for purposes of section 4(1), means any abuse that leads a person to believe that he or she has no reasonable alternative but to submit to exploitation, and includes but is not limited to, taking advantage of the vulnerabilities of that person resulting from—

- (a) the person having entered or remained in the Republic illegally or without proper documentation;*
- (b) pregnancy;*
- (c) any disability of the person;*
- (d) addiction to the use of any dependence-producing substance;*
- (e) being a child;*
- (f) social circumstances; or*
- (g) economic circumstances;”*³⁷⁰

The definition therefore adheres to the international legal requirements. However, by defining it as “*any abuse that leads a person to believe that he or she has no reasonable alternative but to submit to exploitation*” the focus is on the mind-set of the victim. The Model Law warns against this as it implements an onerous burden of proof on the state. It will also work contrary to victim protection measures as a victim will be in the best position to testify to this fact. The aims of successful prosecution and the aim, and obligation, to protect victims could land up on opposing sides of the ring. To better protect victims, the Model Law comments that states may create a definition that focuses not on the victim but rather on the intention of the offender. The onus will then shift from having to prove what the victim felt, inhibiting victim protection, to the state having to prove the intention of the offender. The Model Law prefers the latter, commenting:

³⁶⁸ Article 5(1)(a) of the Model law 9.

³⁶⁹ UNODC *Travaux Préparatoires* (official interpretative notes on article 3 of the Protocol approved by the Ad Hoc Committee and contained in its report on the work of its first to eleventh sessions) (see A/55/383/Add.1 paras 63-68, 347).

³⁷⁰ Definition of “abuse of vulnerability” section 1 of the Trafficking Act.

“These may also be easier to prove, as it will not require an inquiry into the state of mind of the victim but only that the offender was aware of the vulnerability of the victim and had the intention to take advantage of it.”³⁷¹

South Africa has not chosen this route. However, the Trafficking Act provides for specific inclusion of seven factors that represent vulnerabilities which if they were to be taken advantage of would be seen as the “abuse of a position of vulnerability” under the definition of the Act. Firstly, it needs be noted that the list is not exhaustive and the abuse of other vulnerabilities will also qualify for purposes of the prosecution of trafficking crimes. Secondly, the list is comprehensive, in terms of satisfying international obligations. The definition includes, but is not limited to, most of the suggested factors in the example Model Law definition.³⁷² On close comparison, the South African definition provides for all the suggested factors, except for specifically including the vulnerability of a physical or mental disease, that is not a disability. It is submitted that a distinction in this regard is necessary. Disability will not include any and all type of disease, physically or mentally. This might be a legislative oversight. The Trafficking Act further provides social circumstances and economic circumstances as exploitable vulnerabilities. These are very broad categories and lack definition. Perhaps promulgating regulations that provide a broad outline in terms of example circumstances that would ordinarily be accepted as social or economic circumstances would assist in providing some marrow to this bone. It is submitted that providing an outline in this regard would decrease the disputable aspects of the crime and speed up the prosecution process. Thirdly, the definition contains both the paragraph that relates the “abuse of vulnerability” to the victim’s belief that there were no other options and the list from which the victim’s vulnerabilities arise. By use of the wording “and includes” between these two parts of the definition, the legislature intends that the existence of either one of them can be proved in evidence of the abuse of vulnerability. From the definition, the following constitute the elements of an abuse of vulnerability:

1. Abuse of vulnerability that led the victim to believe they had no reasonable alternative:
 - a. abuse;
 - b. the person believed that he or she had no reasonable alternative but to submit to exploitation; and
 - c. a causal link between the abuse and the belief of the person that they had no reasonable alternative.

OR

2. Taking advantage of a position of vulnerability:

³⁷¹ Model Law 9-10.

³⁷² Model Law 9.

- a. taking advantage of the person;
- b. a position of vulnerability; and
- c. a causal link between the position of vulnerability and the taking of advantage of the person.

It is submitted that proof of either 1 or 2 above will be sufficient to constitute an abuse of vulnerability. If 1 be proven, it need not be supplemented with evidence of a specific vulnerability from the list of factors, although evidence of how the perpetrator took advantage of the vulnerability and what the vulnerability was will naturally be led. However, it need not be a listed position of vulnerability but “any” vulnerability as the list is not exhaustive. The same reasoning would apply in cases where the prosecution proves position 2 above. The implication of this being that where it can be proven that an offender has taken advantage of a vulnerability that resulted from one of the listed factors, no inquiry needs to be done into the victim’s mentality. This is achieved by the inclusion of these listed positions of vulnerabilities when taken advantage of, automatically, as “abuse of vulnerability” by the word “includes” in the definition. This is similar to the application of the definition of exploitation. In order to ensure this position, it is advisable to create a presumption that where it has been proven that 1) advantage has been taken of 2) a vulnerability of a person that 3) has resulted from one of the listed positions of vulnerabilities it is presumed until the contrary is proven, that an abuse of vulnerability has taken place. What would further be advisable is to extend this presumption to all vulnerabilities and not just those resulting from the seven listed factors. It is submitted that this is what the legislature intended by providing “any abuse” in the definition. This can be achieved by adding an (h) provision in the listed factors for “any other relevant factors”, as is suggested by the Model Law.³⁷³ The creation of a presumption that comes into effect once the lesser burden of proving that advantage had been taken of vulnerability without having to prove the victim’s subjective belief, would enhance the legal certainty in terms of this definition, lessen the evidentiary burden on prosecution and protect victims from having to testify. Safe for not including medical disease that does not amount to disability as a vulnerability, it is submitted that South Africa is not failing to meet its international obligations in this regard. However, based on the above conclusions it would be a welcome improvement to clarify this definition.

The new Act also provides two categories to prohibit the giving or receiving of benefits in facilitation of trafficking of persons. Sub-paragraph (i) of the definition is similar to the Protocol’s provision in this regard, save for addition of the words “direct or indirect”. Sub-paragraph (j) has the effect of also prohibiting the “*giving or receiving of payments, compensation, rewards, benefits or any other advantage*”. The difference between sub-paragraph (i) and (j) is that paragraph (i) refers to the giving or receiving of payments or benefits to obtain the consent of a person that has control or authority over the person that is to be a victim of trafficking, such as the parent of a child, whereas paragraph (j) does not limit the giving or receiving of the

³⁷³ Model Law 9.

advantage to the obtaining of another authoritative person's consent to the trafficking of another. Without such limitation, it would seem the legislature's intention is to prohibit any instance where any person, a person in control over another or that person him- or herself, becomes subject to an act of trafficking (recruitment, transportation, and so forth) by means of the giving or receiving of an advantage. If this is the intention, it is unclear why the legislature provided for both sub-paragraph (i) and (j) as the prohibited means of sub-paragraph (i) would be included under sub-paragraph (j). The wording following after the list of sub-paragraph (a) to (j) makes it clear that the means would be prohibited in cases of being applied against the trafficking victim or a person in close relationship to the victim and therefore there is no need to provide for such differentiation within the list. It would be more legislatively reasonable to provide one umbrella sub-paragraph (sub-paragraph (j)) and elaborate on the specific methods included thereunder (sub-paragraph (i)) by use of "including the giving or receiving of ... any other advantage". It appears as if the legislature wanted to provide for scenarios where a trafficker bribes a victim to gain their consent to being trafficked. The legislature thereby infers that the granting of voluntary, informed consent by an individual before being trafficked to being trafficked would not render such consent legally valid consent, albeit that it meets the legal requirements of valid consent.³⁷⁴ Therefore, sub-paragraph (j) determines that consent will be irrelevant when a victim grants such consent, albeit fully legally valid consent, in exchange for the receipt or giving of any advantage. The giving or receiving of an advantage does not affect one's ability to grant full, informed consent in the same manner as does fraud or deception. Fraud and deception utilise a misrepresentation of material facts in order to obtain consent.³⁷⁵ As the victim would then not have all the accurate facts to grant consent, such consent will be based on misrepresentation and, as such not valid. For this reason fraud and deception used to traffic a victim, render the victim's consent irrelevant. A person that pays a woman a certain amount to become a sex worker in New York, but makes a misrepresentation as to the amount of customers to be seen and the working conditions in New York would be guilty of trafficking in persons even if the woman gave her consent. However, the other prescribed Protocol methods that render consent irrelevant, do so for a different reason. These are methods falling in the categories of force or the abuse or power or a position of vulnerability. Utilisation of these methods generally infringes on the bodily integrity of the victim or amount to crimes to which consent would not be a valid defence.³⁷⁶ By inclusion of sub-paragraph (j), the legislature creates a new crime, beyond the scope of what is required by the Palermo Protocol, which also renders consent irrelevant. Under this provision, a person that accepts a sum of money to consent to enter into an employment agreement to render sex work in a different country for a salary, to whom the working terms and conditions have been fully disclosed and that person has accepted same, would be a victim of trafficking where the employment would be exploitative to that person. Therefore, although a victim consents fully to

³⁷⁴ Burchell *Principles of Criminal Law* 5 ed 226-233 .

³⁷⁵ Burchell *Principles of Criminal Law* 5 ed 742.

³⁷⁶ Burchell *Principles of Criminal Law* 5 ed 208.

the exploitation, such consent would remain irrelevant. The question is whether this constitutes a breach of an individual's right to freedom of trade, occupation and profession as reserved by section 22 of the Constitution?³⁷⁷ Does this further infringe the offender's right to a defence of consent? Tool 1.3 of the UNODC Toolkit indicates that consent to the exploitation must remain a defence unless it was obtained by improper means.³⁷⁸ The Trafficking Act constructs an additional improper means by inclusion of sub-paragraph (j). Each state has the prerogative to draft its own domestic legislation. However, this legislation must not be contrary to its constitutional rights and existing legal system.³⁷⁹ In that sub-paragraph (j) removes a person's right to freely consent to a contract or job, albeit in exploitation of such person, it limits the person's right to freedom of trade, occupation and profession. The consequent question is then whether such limitation is justified in terms of section 36 of the Constitution.³⁸⁰ The first leg of the section 36 test is that the limitation must be done in terms of a law of general application. As this limitation would be brought about by the Trafficking Act, being a law of general application, this requirement is met. The second leg of the test is whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account the factors listed in section 36(1) of the Constitution. In light of the gravity of the modern trafficking dilemma, it can be foreseen that South African courts would lean toward finding this limitation as reasonable and justifiable. However, this remains to be seen and may very well turn out to be contentious.

³⁷⁷ Section 22 of the Constitution provides: *"Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."*

³⁷⁸ UNODC *Toolkit to Combat Trafficking in Persons* United Nations publication Sales No. E.08.V.14 ISBN 978-92-1-133789-1.

³⁷⁹ Introduction to the Model Law: *"In addition, it is of particular importance that any legislation on trafficking in persons be in line with a State's constitutional principles, the basic concepts of its legal system, its existing legal structure and enforcement arrangements, and that definitions used in such legislation on trafficking in persons be consistent with similar definitions used in other laws"* 1.

³⁸⁰ Section 36 of the Constitution provides a right in the Bill of Rights of the Constitution may only be limited if such limitation complies with certain requirements. Section 36 reads:

"36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

It is clear that the Palermo Protocol intends victim consent to be irrelevant where a method that is prohibited is used in the trafficking process.³⁸¹ The Trafficking Act also provides that consent would be invalid if obtained by prohibited means.³⁸² However, it is further clear that the Palermo Protocol does not intend that valid consent cannot ever be a defence as it explicitly states:

*“The above does not remove the right to a defence. According to paragraph 68 of the interpretative notes ... (A/55/383/Add.1), the irrelevance of consent if one of the means is used should not be interpreted as imposing any restriction on the right of the accused to a full defence and to the presumption of innocence.”*³⁸³

Sub-paragraph (j) determines that the defence of actual consent would not be a valid defence against a charge of trafficking in persons under section 4(1) of the Trafficking Act where the method used to facilitate such trafficking is that of receiving or giving of any advantage. However, based on the reasonability of this limitation in terms of section 36 and South Africa's mandate to promulgate legislation specific to the trafficking scene in South Africa's jurisdiction, it is submitted that the inclusion of the further prescribed method of bribing a victim to consent to being trafficked, can be justified. It must be noted that a definition of exploitation, then, is of immense importance as it is the difference between whether the conduct would constitute an offence or not, consent being irrelevant. There seems to be a fine line between a commercial employment transaction and an offence of trafficking. It must further be borne in mind that in order to raise consent as a defence, such consent would need to be present at all times during the different phases of the trafficking process. In reality, it is highly unlikely that consent will remain through all phases of the trafficking process. Consent might exist up and until a point where a victim no longer wishes to be in the employ of the trafficker and is then refused to leave by subjecting the victim to assault, lock-up and confiscation of travel documents. According to the International Labour Organisation (“ILO”) the right to free choice of employment is “inalienable” and would refusal to leave the employ by an employer constitute forced labour and has been noted as a breach of the Convention that would now, under the new trafficking definition, also be a breach of the Palermo Protocol.³⁸⁴ If consent were then lost at that point, the prior conduct, to which consent might have been given, would also constitute trafficking of that victim. It is submitted that the wide definitions that constitute the trafficking crime presents a risk of abuse of this definition. Consider a scenario where a South African individual consents to being a prostitute in Mozambique. She develops sexual relations with her employer. Upon the romantic relationship turning sour, she wishes to return to South Africa and does so without

³⁸¹ Commentary on article 8 of the Model Law 26; South African Law Reform Commission *Project 131 Trafficking In Persons Report*, 3.

³⁸² Section 11 of the Trafficking Act.

³⁸³ Commentary on article 8 of the Model Law 27.

³⁸⁴ Model Law 15; International Labour Office *Human Trafficking and Forced Labour Exploitation Guidelines for Legislation and Law Enforcement* (2005) 21-22.

being prohibited. She then lodges a charge of trafficking against her employer. Due to the fact that she was transported there and received a benefit in the forms of a salary and perhaps even accommodation and meals the first two elements of trafficking exist. The exploitation element would be present as prostitution is an offence under South African law and would fall under the category of sexual exploitation.³⁸⁵ It is submitted that the international society does not expect prosecution of trafficking where consent is clearly present.

It is therefore submitted that as the definition reads currently, it causes confusion due to the similarity of sub-paragraph (i) and (j) and eliminates the right of victim consent in certain scenarios where it should not. The fact that the wording “*aimed at either the person or an immediate family member of that person or any other person in close relationship to that person*” is included in the definition, determines that there is no need for inclusion of both sub-paragraph (i) and (j).³⁸⁶ As such, it is submitted that, at a minimum, these two sub-paragraphs are to be combined to read:

- (i) the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage, including the direct or indirect giving or receiving of any such advantage to obtain the consent of a person having control or authority over another person;

Such combination would decrease the confusion and superfluous nature of having both these sub-paragraphs. However, as it is unnecessary it would be best to remove the surplus provision and not lengthen the definition more than necessary.³⁸⁷ So doing, the consent dilemma would also be dealt with.

A further concern in respect of the section 4(1) definition is the fact that the methods are only prohibited in so far as they are “*aimed at either the person or an immediate family member of that person or any other person in close relationship to that person*”. This is not as prescribed in the protocol’s definition and, as such, applies to a narrowed scope of events of trafficking nature. The Palermo Protocol definition does not prohibit the methods only when it is applied against 1) the person to be trafficked, or 2) a person in a close relationship to that person. In reference to obtaining consent of a person in order to facilitate the trafficking of another person, the Protocol refers to a “*person having control over another*”³⁸⁸. The Protocol requires that a

³⁸⁵ See the discussion of the exploitation element in 5.2.2.3 below.

³⁸⁶ Mollema *Combating Human Trafficking in South Africa* 466 suggested that the limited phrase referring to the coercion of a person having control over another under the Trafficking in Persons Bill, the counterpart in the Trafficking Act would be sub-paragraph (i), be deleted as superfluous.

³⁸⁷ The length of the definition has already been criticised by researchers and practitioners. The Palermo Protocol definition, as basis of the Trafficking Act definition, has suffered the same critique. In this regard see Mollema *Combating Human Trafficking in South Africa* 467.

³⁸⁸ Section 3 of the Palermo Protocol.

relationship will be established if any form of “control” is present whereas the Trafficking Act requires a “close relationship”. The Trafficking Act does not define what would constitute a “close relationship”. An interpretation based on its ordinary meaning, indicates that it would constitute a relationship “on affectionate or intimate terms”.³⁸⁹ The Oxford dictionary refers to a relationship between immediate family, typically a parent or sibling.³⁹⁰ It is clear that this type of relationship represents a much narrower scope of relationships than provided for under the Palermo Protocol whereby only control is required to provide that the relationship can be subject to abuse. The South African Act has narrowed the scope of affected relationships significantly. Arguably, an employer – employee relationship will not *per se* be considered a “close relationship” and, as such, might be excluded from the ambit of this definition. A further serious concern is that the giving and or receiving of benefits to state officials, such as police officers, immigration officials or hospital staff, would likewise not be included under the ambit of this provision. This is a grave concern. The United States Department of State 2018 Trafficking in Persons report mentions the involvement of officials in the trafficking of persons and lack of prosecution of these officials in South Africa as one of the reasons why South Africa was downgraded to the Tier 2 Watch List from the prior Tier 2 grading.³⁹¹ A further significant relationship that might be excluded is that of an educator with a student. Consequently, the Trafficking Act limits the ambit of the crime by only referring to limited specific and “close relationships” and not providing for any relationships in which control over a person exists. As such, it does not meet the requirements of the Palermo Protocol definition. This is a material shortfall and must be remedied.

5.2.2.2.4. Application to children

One of the major requirements of the Palermo Protocol is that the method element is not to be required as an element of the trafficking crime where the victim is a child.³⁹² In other words, a crime of trafficking in persons would have taken place if a prohibited action has been effected against a child for the purposes of exploitation. The Trafficking Act’s definition of “child” echoes the Protocol’s definition, both defining a child as “a person under the age of 18 years”.³⁹³ The

³⁸⁹ Oxford living dictionaries <<https://en.oxforddictionaries.com/definition/close>> (accessed 30 November 2018).

³⁹⁰ Oxford living dictionaries <<https://en.oxforddictionaries.com/definition/close>> (accessed 30 November 2018).

³⁹¹ The United States Department of State 2018 Trafficking in Persons report states:

“Official complicity and allegations of official complicity affected the government’s prosecution, protection, and prevention efforts and there were significant concerns for victim protection.”

<<https://www.state.gov/j/tip/rls/tiprpt/countries/2018/282748.htm>> (accessed 30 November 2018).

³⁹² Article 3 of the Palermo Protocol.

³⁹³ Section 1 of the Trafficking Act; The Palermo Protocol defines child in article 3(d) as: “‘Child’ shall mean any person under eighteen years of age.’”

Protocol removes the application of the prohibited method requirement by article 3(c) of the Protocol which reads:

“(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article.”³⁹⁴

The Trafficking Act fails to provide similarly. What the South African Act does provide for, is a further crime which pertains to children. Section 4(2) of the act provides as follows:

*(2) Any person who—
 (a) adopts a child, facilitated or secured through legal or illegal means; or
 (b) concludes a forced marriage with another person,
 within or across the borders of the Republic, for the purpose of the exploitation of that child or other person in any form or manner, is guilty of an offence.”*

Section 4(2) therefore sets certain prohibited acts (adopting of a child, conclusion of a forced marriage with any person) for the purpose of exploitation “*in any form or manner*” subject to criminalisation without requiring that these acts be achieved by use of any specific method. This section is a victory and a failure. It is a victory in so far as it removes the prohibited means element in respect of forced marriages of any person, major and minor. However, it is a failure in that it is insufficient to meet the Palermo Protocol requirement in respect of children. In respect of cases where children are the victims of trafficking, the Palermo Protocol requires that all the prohibited trafficking actions (recruitment, transportation, transfer, harbour and receipt), for exploitation purposes, be criminalised irrespective of the means used to achieve such action.³⁹⁵ In stark contrast, the Trafficking Act sets only the adoption and conclusion of a forced marriage with a child subject to criminalisation. Troublingly, this is a much narrower scope of criminalised acts. The Trafficking Act appears to address this further in section 11 that deals with the liability of persons for trafficking offences. Section 11(1)(a) determines that it is not a defence to a charge of trafficking that a child victim or any person having control or authority over the child victim consented to the exploitation or the prohibited action or that the exploitation did not actually occur “even if none of the means referred to in section 4(1)(a) to (j) have been used”. Section 11(1)(a) therefore clarifies that the consent of a child victim would not be an allowable defence even if none of the prohibited means have been used. Seemingly, this provision would render a conviction possible where none of the prohibited means have been employed against a child victim. However, the prohibited means element is still not removed as an element of the

³⁹⁴ Article 3(c) of the Palermo Protocol.

³⁹⁵ D Kassan "Trafficking in Children" (2007) Davel CJ and Skelton AM Commentary on the Children's Act Juta 18-11; Kassan & Mahery "Special Child Protective Measures in the Children's Act" (2009) T Boezaart *Child Law in South Africa* Juta 202.

trafficking crime, as is internationally required. As such, the prosecution will still first have the onus to prove this element before the defence would be required to explain its defence. Section 11 also only deals with cases where the defence is one of consent. If a different defence, such as coercion or mental incapacity be presented, the section 11(1)(a) waiver of the prohibited means element would not come into application. Perhaps by including the fact of “*being a child*” as a position of vulnerability under the “abuse of vulnerability” definition, the legislature seeks to also address this matter. However, this is not sufficient to meet the transnational standard as it still requires proof that the prohibited mean of abusing vulnerability was utilised in facilitating the trafficking process. In their discussion in respect of the interim trafficking provisions under the Children’s Act, Kruger and Oosthuizen refer to the lack of the Children’s Act to waive the prohibited means element in respect of child trafficking victims.³⁹⁶ The Children’s Act provides that the a child will be trafficked if the prohibited action is effected by “*any means, including the use of threat, force or other forms of coercion, abduction, fraud, deception*” for the purpose of exploitation.³⁹⁷ Kruger and Oosthuizen refer to two ways of interpreting “any means”. The one interpretation would be that “any means” does not require a specific mean to be used in the trafficking process. This would have rendered the Children’s Act definition compliant with the Palermo Protocol. The second interpretation, as supported by Kassan, entails that “any means” do, in fact, require one of the specified means to be present. The second interpretation would, correspondingly, not collaborate with the Palermo Protocol. What is disconcerting is that the provisions of the Children’s Act have been repealed by the Trafficking Act, but no provision, save for section 4(2) and section 11(1)(a), is made to address the waiver of the means element in cases of trafficking where a child is the victim.³⁹⁸ The reference therefore to “any means” which, at least, had a possibility of being aligned with the Protocol, no longer exists. If the first interpretation that Kruger and Oosthuizen refer to be accepted, the means element was waived for all acts of trafficking under the Children’s Act trafficking definition, complying with its international obligations. However, by not providing for such waiver under the Trafficking Act, the acts for which the means element is waived under the new legislation (adoption and forced marriages) are less than under the Children’s Act, provided interpretation one is accepted. If Kassan’s alternative interpretation be adopted, neither the Children’s Act nor the Trafficking Act definition adheres to the international requirement. Besides for not complying with the international obligations, this lack is further criticised for the heavier evidentiary onus it brings about.³⁹⁹ Due to the negligence to remove the means element as a required element for the trafficking of children, the Trafficking Act does not meet the international obligation and should this lack be remedied as a matter of urgency.

³⁹⁶ Kruger & Oosthuizen (2012) *PER/PELJ* 318.

³⁹⁷ Section 1 of the Children’s Act 38 of 2005 (“Children’s Act”).

³⁹⁸ Section 48 of the Trafficking Act.

³⁹⁹ Kruger & Oosthuizen (2012) *PER/PELJ* 318.

5.2.2.3. Exploitation

The South African definition of trafficking in persons provides that any prohibited action effected by a prohibited method performed “*for the purpose of any form or manner of exploitation*”⁴⁰⁰ will satisfy the elements of the crime of trafficking in persons. As such, the South African crime definition provides for a broad interpretation and inclusion of all forms of exploitation, as is required by the Protocol. The Trafficking Act definition of exploitation further includes all the minimum forms of exploitation contained by the Palermo Protocol’s definition of exploitation. Further to the Palermo Protocol provisions, the South African list adds exploitation in the form of child labour as defined in section 1 of the Children’s Act and removal of body parts or the involuntary impregnation of a female person for the purpose of selling the resulting baby. The list extends the ambit of “exploitation” for the purpose of trafficking beyond that of a sexual nature. The interim South African trafficking legislation predominantly focused on the criminalising of trafficking where individuals were exploited sexually or where victims were children.⁴⁰¹ The inclusion of specific reference to forced labour and child labour will bring a number of exploitive acts under the ambit of the trafficking offence. The list is also not exhaustive and therefore complies with the Palermo Protocol.⁴⁰²

As mentioned above, the definition of exploitation is of particular importance as it is determinative of whether an offence will amount to trafficking in persons or not.⁴⁰³ The Palermo Protocol does not define any of the forms of exploitation listed in its definition of exploitation. However, the Model Law suggests definitions for the Protocol’s included forms and other potential forms of exploitations.⁴⁰⁴ The Model Law provides definitions for exploitation in the form of debt bondage, exploitation of prostitution of others, forced labour or services, forced or servile marriages, practices similar to slavery, prostitution, serfdom, servitude, sexual exploitation and slavery. South Africa likewise defines many of these concepts with most of them being similar to the Model Law definitions or the examples the law provides. Debt bondage resembles the Australian Criminal Code Act definition. Instead of exploitation of prostitution of others, the Trafficking Act provides a definition for sexual exploitation based on the offender forcing the victim to commit a sexual offence. It is important to note that the South African Act determines that sexual exploitation could only have taken place where the sexual act amounts to the

⁴⁰⁰ Section 4(1) of the Trafficking Act.

⁴⁰¹ The interim trafficking legislation consisted of chapter 18 of the Children’s Act 38 of 2005 and the provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (“Sexual Offences Amendment Act”).

⁴⁰² The Model Law commentary indicates the Protocol’s list must be interpreted as not exhaustive at Model Law 28.

⁴⁰³ See above discussion of sub-paragraph (j) under 5.2.2.2.3.

⁴⁰⁴ Model Law article 5(g) – (j), (l), (m), (q) – (t).

commission of an already criminalised sexual offence.⁴⁰⁵ The Act also does not provide a definition for prostitution. By reason of being a sexual offence under existing South African law, it is included under the ambit of sexual exploitation and no need exists to separately define the term. Pharoah criticises the wideness of the definition of exploitation in that sexual abuse of a student by a teacher would also be seen as trafficking under this definition. Pharoah foresees problems with the practical application of such a wide definition with certain limits.⁴⁰⁶ The South African definition of forced labour seems more definite than that of the Model Law. Whereas the Model Law refers to the infliction or threat of a “penalty” to extract the services of a person, the Trafficking Act broadens the scope by providing that “*threats or perceived threats of harm, the use of force, intimidation or other forms of coercion, or physical restraint to that person or another person*” to extract labour services from a person will also amount to forced labour. Although seemingly a duplication of certain methods, the inclusions can do no harm.⁴⁰⁷ However, it again elongates the trafficking definition. A question arises as to the limits of forced begging under this broad definition. Forced begging would fall under the ambit of forced labour and, as such, is criminalised. If the Palermo Protocol requirement be adopted that waives the element of use of a prohibited method in respect of child victim, a parent that takes his or her child from their house to a busy intersection in order to beg in assistance to the parent or for money that will be given to the parent, this would amount to exploitation and, therefore, trafficking of such child. The difference between this scenario and a scenario in which a parent merely takes a child with whilst the parent is begging in order not to leave the minor alone at home becomes obscure. As such, clarifying this position would be wise. The South African definition of forced marriage also provides for a broader scope of application than the Model Law definition in that it includes involuntary marriage of both men and women. The Model Law definition relates solely to marriages in which women or children are the forced party. The Model Law, however, comments that states have the freedom to provide otherwise. South Africa has rightly extended this definition to provide for any possible scenario. The definitions for servitude and slavery are materially similar. The South African Act has no separate definition for serfdom, but such practice would fall under the terms of slavery and servitude as defined. The Trafficking Act also does not provide separately for practices similar to slavery as such would also be included under the provided definitions. By providing these definitions in broad terms, South Africa provides for a wide array of exploitative purposes that amounts to an extension of the pre-

⁴⁰⁵ Section 1 of the the Trafficking Act defines “sexual exploitation” as meaning “*the commission of—*

- (a) *any sexual offence referred to in the Criminal Law (Sexual Offences and Related Matters) Amendment Act; or*
- (b) *any offence of a sexual nature in any other law;”*

⁴⁰⁶ Mollema *Combating Human Trafficking in South Africa* 468; R Pharoah “Getting to Grips with Trafficking: Reflections on Human Trafficking Research in South Africa” (2006) Institute for Security Studies Monographs 77-78.

⁴⁰⁷ Mollema *Combating Human Trafficking in South Africa* 467.

Trafficking Act position in which only exploitation of children and sexual exploitation were criminalised. South Africa thus satisfies the international requirement in respect of this element.

5.2.2.4. Criminalisation of ancillary crimes

The Trafficking Act criminalises the attempt to participate in trafficking, the incitement, instigation, command, directing, aiding, promotion, advising, recruitment, encouraging or procuring of any other person and the conspiring to commit the trafficking offence. The international requirement to criminalise the attempt, participation and directing of others to commit trafficking is met. The Palermo Protocol also requires criminalisation of the organising of other persons to commit trafficking.⁴⁰⁸ The Trafficking Act includes a range of different forms of incitement such as instigating, commanding or directing, but does not include organising in this list. It could be argued that the term *directing* would cover *organising* as well. However, Mollema mentions that the exact meaning of organising and directing is not the same. She suggests it might be prudent to include organising in this broad list, especially taking into consideration that acts of trafficking regularly form part of organised criminal activity and bearing in mind that the Palermo Protocol is supplementary to the Convention in combating organised crime.⁴⁰⁹ The Riotous Assemblies Act 17 of 1956 ("Riotous Assemblies Act") sufficiently criminalise these acts. As such, they are redundant. However, providing for all trafficking matters and crimes in a single document is beneficial in assisting prosecution.

5.2.2.5. Conclusion

South Africa satisfies the international obligation to promulgate legislation that criminalises the trafficking of persons as defined in the Palermo Protocol by having promulgated the Trafficking Act. The definition that the Trafficking Act provides is broader than the Palermo Protocol definition in many aspects, thereby providing for a wider array of prosecutable crimes. Both the prohibited actions and methods are widely defined, barring all the required Protocol elements and more. The exploitation element is correctly expanded to provide for more than merely the exploitation of children and sexual exploitation. It further provides for forced marriages to be seen as exploitation, which, in the South African cultural context, is a welcome and necessary inclusion. The Trafficking Act's criminalisation falls short in that it does not provide for the non-application or waiver of the prohibited means in respect of trafficking of children. So doing it is in stark contrast with its international obligation and unnecessarily loads the evidentiary burden in prosecution of such cases. It is further suggested that limitations in respect of certain parts of the definition is necessary to ensure the definition is not overly broad, including acts that are not intended to be trafficking in persons, and renders its practical application problematic. South

⁴⁰⁸ Article 5(2)(c) of the Palermo Protocol.

⁴⁰⁹ Mollema *Combating Human Trafficking in South Africa* 470, 555.

Africa further criminalises any involvement in the commission of trafficking, as is internationally required.

5.2.3. **The obligation to prevent trafficking in persons and cooperate with other states**

Chapter III of the Palermo Protocol imputes the obligation to prevent trafficking as well as to provide for provisions in a state's legal framework for cooperation with other states in the prevention of trafficking. Prevention of the crime of trafficking cannot be reached only by legal measures.⁴¹⁰ The root causes of the problem must also be addressed.⁴¹¹ However, South Africa is internationally required to prohibit and sanction certain ancillary and related offences in order to prevent the phenomenon of the crime. In this regard, South Africa criminalises a range of additional crimes in adhering to this requirement.

Debt bondage, the possession, destruction, confiscation, concealment of or tampering with documents, the use of services of victims of trafficking, conduct facilitating and any involvement in the commission of trafficking in persons are also crimes created under the Trafficking Act. The requirements of the Protocol are matched by the South African provisions, however, South Africa also expand on the Protocol's expected crimes by providing for more offences. The offences created by the Trafficking Act in order to fulfil the obligation to cooperate with member states are discussed below in order to establish their sufficiency.

5.2.3.1. **Section 4(2) of the Trafficking Act**

Section 4(2) further criminalises the adoption of a child and the conclusion of a forced marriage with a person within the borders of South Africa for the purpose of exploitation of that child or person. The scope of this crime is limited to the commission of such acts within the borders of the South African Republic whereas the crime of trafficking can take place trans-nationally and still be prosecuted in South Africa.⁴¹² The South African Act specifies these acts as distinct crimes, separating them from the ambit of trafficking in persons defined in section 4(1) of the

⁴¹⁰ Mollema *Combating Human Trafficking in South Africa* 500.

⁴¹¹ Mollema *Combating Human Trafficking in South Africa* 500. Mollema criticises the Trafficking in Persons Bill for not elaborating on the root causes and specific cultural nuances of trafficking in the South African jurisdiction. The Trafficking Act also fails to include this contextualisation.

⁴¹² Section 12 of the Trafficking Act provides that South African courts have extra-territorial jurisdiction to prosecute cases of trafficking that took place outside of the South African borders where the suspect is a South African citizen, is ordinarily resident in South Africa, the victim is a South African citizen or is ordinarily resident in South Africa, the suspect is present in South African territory and the person has not or will not be extradited to South Africa or the person is a juristic person or partnership registered in terms of South African law.

Trafficking Act. It would appear this is done in order to remove the prohibited means requirement in respect of these offences. The criminalisation clause stipulates that these acts “in any form or manner” will be an offence. In so far as South Africa is obliged and has the mandate to prevent and combat forms of trafficking prevalent in its jurisdiction, it meets this requirement by such criminalisation. This provision prevents the manipulation of certain cultural practices such as *ukuthwala* and *lobola* that have been abused in the South African context.⁴¹³ The prevalence of these in the South African jurisdiction required that the legislation address them separately. The inclusion of these crimes as separate, emphasised offences ensure that they, in their corrupted invalid form, shall not suffice as defence to a charge of trafficking in persons.

South Africa, therefore, satisfies the international requirement to criminalise trafficking and related contextual crimes in prevention of the crime.

5.2.3.2. **Obligation on commercial carriers**

Article 11(3) of the Palermo Protocol requires party states to provide an obligation on commercial carriers to ensure all passengers are in possession of travel documentation necessary for entry into the destination country. Article 11(4) of the Protocol also requires sanctions for non-compliance with this obligation by commercial carriers. South Africa has promulgated section 9 of the Trafficking Act, which provides that it is an offence for a carrier of passengers to transport a person that it knows or should reasonably have known is a victim of trafficking.⁴¹⁴ This section further provides that if a carrier suspects that one of its passengers is a victim of trafficking the carrier is required to report this fact to the police for investigation.⁴¹⁵ Failing to do so will be an offence.⁴¹⁶ Heavy sanctions in terms imprisonment, fines as well as for the costs of repatriation, accommodation and care of victims of trafficking are imposed upon the carrier for the abovementioned two offences.⁴¹⁷ It is clear that the Trafficking Act provisions do not align with the Protocol's requirement that carriers are to ensure that passengers possess travel documentation. The 2010 Trafficking Bill dealt with the liability of carriers in clause 9 of the Bill. The specific criminalisation clause read as follows:

⁴¹³ Refer to the discussion of these cultural practices in 4.2.4, 4.3.2 and 4.3.3 above.

⁴¹⁴ Section 9(1) of the Trafficking Act.

⁴¹⁵ Section 9(2) of the Trafficking Act.

⁴¹⁶ Section 9(3) of the Trafficking Act.

⁴¹⁷ Section 9(4) of the Trafficking Act. Section 9(4) provides that “*a carrier is liable to pay the expenses incurred or reasonably expected to be incurred in connection with the care, accommodation, transportation and repatriation or return of the victim to his or her country of origin or country or place from where he or she was trafficked, if the court finds, on a balance of probabilities, that the carrier has knowingly transported a victim of trafficking or ought reasonably to have known or suspected that it was transporting a victim of trafficking.*”

“9. (1) A carrier who brings a victim of trafficking into or removes a victim of trafficking from the Republic knowing that the victim of trafficking does not have a passport and, where applicable, a valid visa required for lawful entry into or departure from the Republic, is guilty of an offence and is liable on conviction to a fine not exceeding R1 million or to imprisonment for a period not exceeding five years.”

The above provision has the effect of requiring carriers to ensure that passengers have a passport and a valid visa, where these are required for entry into or from South Africa. However, this provision was not retained in the Trafficking Act. Instead, the different and less burdensome offence of transporting a person when the carrier knows or reasonably ought to have known that such person is a trafficking victim is criminalised by the new Act. The liability that a member state is to place on commercial carriers as required by the Palermo Protocol is not provided for in the Trafficking Act. The Model Law as well as the interpretative notes to the Palermo Protocol advise that it is not a requirement to include the requisite liability of commercial carriers in the trafficking legislation, or any part of the criminal law of the state.⁴¹⁸ Both documents state that legislative measures are but one way to impute the liability. “Other appropriate measures” can be used as well.⁴¹⁹ In the South African context section 35 of the Immigration Act read with the regulations to that Act, requires owners of conveyances to provide certain information in respect of their passengers to the Director-General of the Department of Home Affairs. Conveyance is defined broadly as “*any ship, boat, aircraft or vehicle, or any other means of transport.*”⁴²⁰ This matches the similarly broad definition of “carrier” in the Trafficking Act.⁴²¹ To be noted is that both these definitions are broader than the term “commercial carrier” used in the Palermo Protocol. This expansion extends the obligation to all transporters of individuals, including non-owners of the form of transport. Kruger commends this expansion as it brings all natural and juristic providers of transport under the ambit of this obligation.⁴²² However, the nature of the obligation under the Immigration Act does not seem to match the Palermo Protocol requirement. The information to be reported under section 35 of the Immigration Act includes the travel document type used by the passenger. The conveyance will be required to ascertain what document type the passenger is travelling with. However, this obligation cannot be said to equate with the obligation to ensure the possession of travel documentation by the passenger. In order for South Africa to fully comply with the requirement to hold commercial carriers liable in accordance with article 11(4) of the Palermo Protocol, it is advised that South Africa add this duty either to the regulations to the Immigration Act or, more ideally, to section 9 of the

⁴¹⁸ Article 17 of the Model Law 39-40; UNODC Travaux Préparatoires para 79.

⁴¹⁹ Article 11(2) of the Palermo Protocol.

⁴²⁰ Section 1 of the Immigration Act.

⁴²¹ The definition of carrier as provided for in section 1 of the Trafficking Act is: “*“carrier” includes a person who is the owner or employee of the owner, an agent, an operator, a lessor, a driver, a charterer or a master, of any means of transport.*”

⁴²² Kruger *Combating Human Trafficking* 573.

Trafficking Act. By providing the latter, South Africa acknowledges that it is important to determine the liability of commercial carriers that convey victims to ports of interest and addresses the potential collusion between traffickers and carriers.⁴²³ This can be achieved by adding a provision to section 9 that could read:

9(1) A carrier who transports a person within or across the borders of the Republic, must verify that such person is in possession of the identity and/or travel documentation required to enter or depart from the Republic of South Africa and any transit countries.⁴²⁴

5.2.3.3. Cooperation with other states

The Palermo Protocol (part III: articles 9 to 13) calls upon states to provide for cooperation between member states in the combat and prevention of trafficking in persons.⁴²⁵ The Protocol does not require that all of these aspects be addressed in the state's anti-trafficking legislation as long as it is provided for somewhere in the member state's law. Section 37 of the Trafficking Act provides for international cooperation and entails that the president has the power to conclude, amend and revoke international agreements with foreign states regarding any matters that pertains to trafficking in persons. The scope and aims of article 9 of the Protocol are thus provided for. The Trafficking Act does, however, not specify what types of cooperation between states is envisioned.⁴²⁶ It is suggested that referring to the cooperation as required in the Protocol in the trafficking context would be most effective and most prudent in ensuring accurate prosecution. The requirements of article 12 of the Protocol are met by the prohibition against falsifying or abuse of identity documents under the Identification Act 68 of 1997, as amended ("Identification Act").⁴²⁷ The Immigration Act 13 of 2002 ("Immigration Act") further prohibit the fabrication, falsification, misuse or illegal possession of visa's, residency permits, certificates, passports or other travel documentation.⁴²⁸ The provisions of the Identification Act and Immigration Act are comprehensive in respect of the provisions of the Palermo Protocol that pertains to documentation. South Africa satisfies its international requirements in respect of the unlawful handling of travel or identity documents in respect of these. Section 38 of the Trafficking Act determines that the Director-General: Home Affairs is required to verify the legitimacy and validity of identification or travel documents that appears to be issued by the South African Department of Home Affairs, upon the request of a ratifying member state and within a reasonable time. This serves as South Africa's adherence to article 13 of the Palermo Protocol.

⁴²³ SA Law Reform Commission *Project 131 Trafficking in Persons Report* 38.

⁴²⁴ See the discussion of article 17 of the Model Law and consequent examples at Model Law 40.

⁴²⁵ See discussion of these provisions at 2.1.2.2.3.

⁴²⁶ Mollema *Combating Human Trafficking in South Africa* 565.

⁴²⁷ Sections 18, 19 and 21 of the Identification Act 68 of 1997, as amended ("Identification Act"). The latest amendments to the Identification Act were brought about by Act 28 of 2000.

⁴²⁸ Sections 28, 38, 42, 49 and 50 of the Immigration Act 4 of 2004.

What seem to be missing from the South African legal structure are provisions requiring the training of state officials specific to the prevention and prosecution of trafficking (as required by article 9) and provisions providing for the information exchange between member states (article 10 of the Protocol). It is submitted that the information exchange will not be prohibited from taking place merely under the Palermo Protocol. However, to improve the ease and to regulate the process of obtaining such information, the conclusion of international agreements should be mandated. It is also advisable that provision for training of the relevant officials, such as law enforcement and immigration officials, must be made in the Trafficking Act. It is clear from the 2018 United States Department of State report regarding the status of trafficking in persons in South Africa, that the training efforts made thus far are inadequate.⁴²⁹ In light of the need to provide one cohesive document that addresses all trafficking-related matters, it is submitted that it is advisable to provide for provisions that authorise the exchange of information, training of officials, border control requirements, and criminalisation of unlawful handling of travel and identification documents in the specific context of trafficking.

5.2.4. The obligation to protect and assist victims

South Africa is required to protect and assist both foreign and national victims of trafficking in persons. The primacy of human rights as one of the fundamental points of departure for the prevention and combat of the trafficking offence, should inform each state's approach to this obligation.⁴³⁰ Although the Model Law sets the provisions of victim protection as optional for inclusion in the legislation adopted to criminalise trafficking in persons, the Palermo Protocol is clear that this is an unconditional obligation that party states cannot neglect.⁴³¹ The Trafficking Act thoroughly deals with this obligation in chapters 3 to 7 and certain provisions of chapter 8. Chapter 3 provides protective measures to foreign victims in respect of the investigation and prosecution of the trafficking crime. Sections 15 and 16 of this chapter provide that a recovery and reflection period be afforded to victims similar to many other countries.⁴³² These protective rights are, however, subject to the cooperation of the person in the investigation and prosecution of the alleged offender. Sections 15 and 16 both contain requirements of assistance in order for a foreign witness or victim to be issued with a visitor's visa. Section 15 provides that a foreign person, of whom the National Police Commissioner has confirmed in writing is able to assist in

⁴²⁹ The United States Department of State 2018 Trafficking in Persons report <<https://www.state.gov/j/tip/rls/tiprpt/countries/2018/282748.htm>> (accessed 30 November 2018).

⁴³⁰ N Pillay "Human Rights based approach to trafficking" 29 November 2011; Article 14 of the Palermo Protocol; MS Mcanyana *The Legal Framework Regulating the Protection and Assistance of Victims of Trafficking: A South African Perspective* LLM UP (2016) 8.

⁴³¹ Mcanyana *The Legal Framework Regulating the Protection and Assistance of Victims of Trafficking* 8. Article 6 of the Palermo Protocol determines that this obligation is peremptory by the words "shall ensure".

⁴³² Kruger *Combating Human Trafficking* 372. Germany, Belgium, Norway, Canada, Netherlands, Italy, United States of America and Spain are mentioned in Kruger's study.

a police investigation of trafficking, may be granted a visitor's visa. Failing such assistance, the person may be repatriated. Admittedly, this provision is an extension of the Protocol's requirements in that it affords a measure of protection to witnesses that are not trafficking victims. Section 16 provides a similar protective right to foreign victims, who, firstly, are present in South Africa and secondly, have agreed to cooperate in the investigation and prosecution of the offence. The visitor's visa can be withdrawn upon the request of the National Director of the South African Police Service as well as by the National Director of Public Prosecutions. As such, the victim's cooperation in the investigation and prosecution is the foundation for this protection measure. Although, neither the Palermo Protocol nor the Convention determine that requiring witness cooperation as prerequisite to the protection and assistance of such witness, albeit a victim, is not allowed, Kruger argues that it is against international human rights approaches.⁴³³ The Model Law unambiguously confirm that it is not an obligation upon member states, but mentions that providing a reflection period aside from any obligation upon witnesses to cooperate with officials, assist states in meeting their international obligation to protect and assist victims.⁴³⁴ It is further submitted that investigation and prosecution is more effective if the witness remains present in the country and receives access to care and assistance as early as possible.⁴³⁵ Chapter 4 regulates the identification and protection of victims, generally. Further than what is explicitly required by the Protocol, this chapter creates a legal duty to report suspected or known trafficking incidences in respect of children and adult victims.⁴³⁶ It also provides for the safe-keeping, provision of medical services to foreigners with reference to section 27 of the Constitution.⁴³⁷ So doing, the requirements of article 6(3) of the Protocol which merely require member states to consider implementing measures to provide for the physical and psychological recovery of victims are exceeded. Section 22 of the Act provides that the prosecutor may, in deciding whether or not to prosecute a victim of trafficking for a crime that stemmed forth as a *direct* result of being a victim of trafficking, take into consideration that the crime is a direct result of the trafficking to which the victim was subjected to. As the Palermo Protocol does not address this matter directly, it is not a breach of the Protocol's requirements. However, such an approach is greatly criticised as a failure to uphold the binding international or regional human rights instruments.⁴³⁸ As mentioned above, many writers are of the certain opinion that affording victims legal protection against prosecution for crimes that stem forth directly out of their disposition as trafficking victim, remains an international requirement under other human rights and victim protection instruments to which the protocol and Convention are supplementary. The accreditation of organisations that will provide services to trafficking victims

⁴³³ Kruger *Combating Human Trafficking* 371; Office of the United Nations High Commissioner for Human Rights *Annual Report* (2002) 48; Model Law 56.

⁴³⁴ Model Law 59.

⁴³⁵ UNODC Toolkit (2008) 175; Kruger *Combating Human Trafficking* 371.

⁴³⁶ Sections 18 and 19 of the Trafficking Act.

⁴³⁷ Sections 18, 19 and 21 of the Trafficking Act.

⁴³⁸ Kruger *Combating Human Trafficking* 369; Foundation Against Trafficking in Women et al. (2001) 3-5.

are dealt with in Chapter 5. This is a further expansion on the Protocol's requirements. In fulfilment of article 6(6) of the Palermo Protocol, chapter 6 of the Trafficking Act provides that victims are to be compensated in certain circumstances for damages suffered. Chapter 7 deals with the safe repatriation of victims, in line with article 8 of the Palermo Protocol. Section 36 of chapter 8 protects the child victim in cases where his or her parents played a role in the trafficking process. Together, sections 36, 18 and 28 meet the minimum requirement of article 6(4) of the Palermo Protocol providing for special needs of victims especially those that are children. As such, it is submitted that South Africa has exceeded the minimum standards of the Protocol in providing for victim protection and assistance measures within the Trafficking Act. Considering that neither the Palermo Protocol, nor the Convention, adequately seeks to address this matter, other international obligations exist in this regard and are to be maintained. In this regard, South Africa is criticised for subjecting its victim protection provisions to the victim's willingness or capacity to cooperate with law enforcement and prosecutors. In summary, South Africa complies with the minimum standard set out in the Palermo Protocol by providing for the protection of victims' physical safety,⁴³⁹ protection of privacy and identity,⁴⁴⁰ possible protection against prosecution, detention and summary deportation⁴⁴¹ and victim compensation.⁴⁴² This framework is adequate in meeting the international requirements. However, as all of these provisions have not yet come into effect, South Africa is being significantly criticised. Sections 15, 16 and 31(2)(b)(ii) of the Act have not yet come into effect. The United States of America has presented this as one of the compelling reasons to have downgraded South Africa to the Tier 2 Watch list in its 2018 annual report.⁴⁴³ Until South Africa put these provisions into effect, it falls short of its international obligations.

5.2.5. Adequate sanctions

In order to adequately prevent and combat crime, one must deter participation therein with "effective, proportionate and dissuasive" sanctions.⁴⁴⁴ Apart from criminalising the required conduct, South Africa must also ensure that adequate penalties are prescribed for the commission of trafficking and trafficking-related offences. The Convention provides that the international obligation will be met if the sanctions take the gravity of the offence and the need to deter further commissions of such offences into account.⁴⁴⁵ The Palermo Protocol does not

⁴³⁹ Section 18 and 19 of the Trafficking Act.

⁴⁴⁰ Section 23 of the Trafficking Act.

⁴⁴¹ Section 22 and chapter 7 of the Trafficking Act.

⁴⁴² Chapter 6 of the Trafficking Act.

⁴⁴³ The United States Department of State 2018 Trafficking in Persons report <<https://www.state.gov/j/tip/rls/tiprpt/countries/2018/282748.htm>> (accessed 30 November 2018).

⁴⁴⁴ Kruger *Combating Human Trafficking* 332; OHCHR *Annual Report* (2002) 4, 8.

⁴⁴⁵ See the discussion under 2.1.2.2.1.7 above.

provide specific guidelines in respect of sentencing of trafficking offences.⁴⁴⁶ However, article 2(b) of the Convention stipulates that the penalty for serious crimes shall be at least four years of deprivation of liberty or a more serious penalty.⁴⁴⁷ In the context of sentencing, the Model Law views trafficking in persons as a “serious crime” that warrants punishment as referred to in section 2(b) of the Convention.⁴⁴⁸ The South African prescribed punishments should therefore reflect the view that the crime is serious. The Trafficking Act provides for penalties that consist of a fine, imprisonment or both.⁴⁴⁹ Section 13 of the act provides different penalties for the various crimes established under the Trafficking Act. Five different provisions are provided. The relevance and adequacy of these sanctions in meeting the requirement to punish trafficking will be considered. Section 14 of the act further provides the factors that are to be considered in deciding upon an appropriate penalty.

South African law provides that in any sentencing proceedings the trial court has the discretion to impose sentence and must take the three factors, known as the “triad of Zinn” into consideration. These factors are the interest of the community, the seriousness of the crime and the circumstances of the accused are to be taken into consideration.⁴⁵⁰ These factors will be taken into account in sentencing convicted traffickers.

Section 13(a) determines that a person convicted of trafficking in persons is, subject to section 51 of the Criminal Law Amendment Act 105 of 1977 (“Criminal Law Amendment Act”), liable to pay a fine not exceeding R100 million rand or imprisonment or imprisonment without the option of a fine or both. The provision provides that the imprisonment can include a life sentence.⁴⁵¹ Section 13(b) provides that persons found guilty of the offence created by section 4(2), being the adoption of a child for exploitative purposes or the conclusion of a forced marriage, shall likewise be liable to a fine not exceeding R100 million or imprisonment, including life imprisonment, or imprisonment without the option of a fine or both. Section 13(c) provides sentences of a fine or imprisonment of fifteen years or both in cases of conviction for an offence referred to in section 5, 7 and 23 of the Trafficking Act. As such debt bondage, using the services of a trafficking victim as well as allowing unauthorised access to or disclosing any information in

⁴⁴⁶ The preamble to the Palermo Protocol does, however, indicate that the protocol is an instrument that supplements the Convention in punishment of trafficking in persons. As such, it is submitted that the protocol does, in fact, mandate and, even, obligates party states to prescribe punishment for the crimes it creates to prevent, suppress and combat trafficking in persons.

⁴⁴⁷ Section 2(b) of the Convention defines “serious crime” as: “*conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.*”

⁴⁴⁸ Model Law 27.

⁴⁴⁹ Section 13 of the Trafficking Act.

⁴⁵⁰ *S v Zinn* 1969 2 SA 537, 540.

⁴⁵¹ Section 13(a) of the Trafficking Act: (a) section 4(1) is, subject to section 51 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), liable to a fine not exceeding R100 million or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine or both.

respect of a victim or suspected victim of trafficking is subject to a maximum of fifteen years imprisonment. Section 13(d) provides that a fine, imprisonment up to ten years or both can be imposed upon a person convicted of an offence referred to in section 6 or 8(1) of the Trafficking Act. These provisions criminalise the possession, destruction, confiscation, concealment of or tampering with documents (section 6) and certain conduct facilitating trafficking (section 8(1)). The final provision of section 13, provides for liability for a fine, five years maximum imprisonment or both where a person has been convicted of the trafficking-related offences under sections 8(3), 9, 18(9) or 19(13) of the Trafficking Act.⁴⁵²

Minimum sentences are specified for certain crimes by way of section 51 of the Criminal Law Amendment Act. By subjecting section 13(a) to section 51, the legislature sets a minimum sentence for commission of the main offence of trafficking in persons as provided for in section 4(1) of the Trafficking Act. Section 51(2) determines that a person convicted of an offence included in part II of schedule 2 to the Criminal Law Amendment Act shall be sentenced in the following manner:

“(2) Notwithstanding any other law but subject to subsections (3) and (6). a regional court or a High Court shall—

- (a) if it has convicted a person of an offence referred to in Part II of Schedule 2, sentence the person in the case of—*
 - (i) a first offender, to imprisonment for a period not less than 15 years;*
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and*
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;”*⁴⁵³

The wording is clearly peremptory. The Trafficking Act amends the Criminal Law Amendment Act in order to provide that all of the offences created in section 4 of the Trafficking Act are included in part II of schedule 2.⁴⁵⁴ The minimum sentence for trafficking in persons under

⁴⁵² Section 8(3) criminalises the failure of an electronic communications service provider to take all reasonable steps to ensure that it does not host information that facilitates the trafficking of persons, to report such information once discovered, to preserve any evidence and to prevent further access to the facilitative information. Section 9 criminalises the transportation of any person where such carrier knows or ought reasonably to have known that the person is a victim of trafficking. Section 18(9) provides that the failure to report the trafficking or suspected trafficking of a child as an offence. Section 19(13) accordingly provides that the failure to report the trafficking or suspected trafficking of an adult by a person that came to know about or suspects such trafficking while conducting their normal duties.

⁴⁵³ Section 51(2) of the Criminal Law Amendment Act 105 of 1977.

⁴⁵⁴ Section 48 of the Trafficking Act amends the Criminal Law Amendment Act as is provided in the schedule to the act. The schedule provides: ‘5. *The amendment of Part II of Schedule 2 by the substitution*

section 4(1) as well as the offence created under section 4(2) is fifteen years of incarceration. The penalty clauses for trafficking in persons under section 4(1) and section 4(2) appear similar. However, section 13(b) of the Trafficking Act (providing for sentencing in respect of the section 4(2) offence) does not stipulate that it is subject to section 51 of the Criminal Law Amendment Act as is specifically done in section 13(a) of the Trafficking Act, although the section 4(2) offence is included in part II of schedule 2 to the Criminal Law Amendment Act. The Criminal Law Amendment Act dictates that the minimum sentence in this regard is “*notwithstanding any other law*”. The exclusion of the wording “*subject to section 51 of the Criminal Law Amendment Act*” from section 13(b) of the Trafficking Act consequently does not affect that the minimum sentence for commission of a section 4(2) offence is subject to the minimum sentence provisions of the Criminal Law Amendment Act with all section 4 offences having been added to the Criminal Law Amendment Act schedules.⁴⁵⁵ The minimum sentence for a section 4(2) offence is thus set as life imprisonment. Therefore, the minimum sentencing requirement as provided for by the Convention of four years of deprivation of freedom, in whichever form, is met. It must be noted that although section 51 trumps any other law, the section is subject to sub-sections 3 and 6 of that section.⁴⁵⁶ Section 51(3) provides courts with an escape option to not impose the provided minimum sentence if it is satisfied that substantial and compelling circumstances exist that warrant the imposition of a lesser sentence such as that the offender was a child at the time the offence was committed.⁴⁵⁷ Recent incidences show that South African courts seem to keenly lean on the escape clause under section 51(3) as a number of suspended sentences or sentences that consist predominantly of fines have been noted in cases where the international standard require deprivation of freedom. This has been criticised in the United States US 2018 Trafficking report in respect of South Africa. The United States’ outrage with the convictions in which sentences of fines only were imposed, is clearly indicated in their downgrading of South Africa to the Tier 2 Watch List, again.⁴⁵⁸ Although the South African prosecution has prosecuted and penalised certain serious trafficking cases with serious penalties,⁴⁵⁹ the US trafficking report indicate that it has happened, and, therefore, remains legally possible that similarly serious trafficking crimes, when prosecuted, are not punished with penalties of the required gravity,

for the item “[Trafficking in persons for sexual purposes by a person contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007]” of the following item: “Offences provided for in section 4, 5 and 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013.”’

⁴⁵⁵ Section 48 of the Trafficking Act. See note 454 above.

⁴⁵⁶ See the wording of section 51 of the Criminal Law Amendment Act.

⁴⁵⁷ Section 51(6) of the Criminal Law Amendment Act read with *Centre of Child Law v Minister of Justice and Constitutional Development* 2009 (2) SACR 477 (CC).

⁴⁵⁸ The United States Department of State 2018 Trafficking in Persons report <<https://www.state.gov/j/tip/rls/tiprpt/countries/2018/282748.htm>> (accessed 30 November 2018).

⁴⁵⁹ *Jezile v S and Others* 2016 (2) SA 62 (WCC); *Dos Santos v S* 2018 1 SACR 20 (GP); *S v Eloff* unreported case number: SH599/08 Welkom.

being deprivation of freedom. In this regard, the South African prosecution seems to be at fault, perhaps due to innocent ignorance. Although it is provided that the minimum sentence provisions of section 51 trump any other law, the escape clause under section 51(3) cannot be applied in breach of the international penalty provisions. The US trafficking report suggests that greater measures to train prosecution and police officials be implemented in order to curb this discrepancy.⁴⁶⁰

The Model Law suggests that the fixing of monetary amounts in the legislative text be avoided. South Africa has, however, opted to set specified monetary fines within the Trafficking Act. This does not breach any international requirement and, as such, is not problematic. The set amounts will need to be evaluated regularly to ensure they remain adequate as punishment.

Member states are also required by article 6(6) of the Palermo Protocol to ensure that their national legislation include measures that make it possible for victims of trafficking to be compensated for damages that they have suffered due to their trafficking. Provision for such compensation need only be made in the domestic trafficking legislation of the state if its legislation does not provide for such compensation to be awarded to victims otherwise.⁴⁶¹ South Africa has chosen to provide this right to victims by way of section 29 of the Trafficking Act. The South African criminal procedure law also provides that courts may award a person that suffered damage or loss to property, including money, compensation.⁴⁶² However, the CPA right is limited to damage suffered of corporeal nature. The Trafficking Act provision expands on this right to compensation afforded to victims by allowing courts to provide compensation for physical, psychological or other injury, being infected with a life-threatening disease and for loss of income or support, in addition to the restitution granted for damage or loss to property. This is a welcome expansion. It rightly recognises the undeniable inter-twined impact of trafficking on the human rights of victims in material measures that, in most incidences, will exceed the impact of any damage to property.⁴⁶³ The United Nations state that,

⁴⁶⁰ The United States Department of State 2018 Trafficking in Persons report <<https://www.state.gov/j/tip/rls/tiprpt/countries/2018/282748.htm>> (accessed 30 November 2018). Further support for the imposition of stricter sentences in order to effectively deter traffickers can be found in: UNODC "Global Report on Trafficking In Persons" (2018) 39.

⁴⁶¹ Article 28 of the Model Law, 53. See the discussion under 2.1.2.2.1.7 above.

⁴⁶² Section 300 of the CPA.

⁴⁶³ Kruger *Combating Human Trafficking* 263; M Dottridge and D Weissbrodt "Review of the Implementation of and Follow-up to the Conventions on Slavery" (1999) German Yearbook of International Law 42 249.

*“...keeping the best interests of the victim in the forefront of criminal justice responses not only [supports] the victim’s human rights, but also [serves] the interests of the criminal justice system in achieving prosecutions”.*⁴⁶⁴

As the victim’s human rights are to be kept central in all human rights responses, section 29 of the Trafficking Act is in line with what is internationally required to protect and assist victims in terms of compensation and restitution.

It is not an international law requirement that aggravating factors be listed in the domestic trafficking legislation of ratifying states, but the Model Law proposes an optional provision in this regard.⁴⁶⁵ South Africa included a similar provision by way of section 14 of the Trafficking Act.

South Africa’s legal framework adequately provides for sanctioning of human trafficking offences. However, the current application of the section 51(3) escape clause seems to circumvent the international requirement that the sanctions imposed, or imposable, must adequately reflect the gravity of the offence and the need to deter further offences of this nature. It further does not always meet the minimum requirement set by the Convention that dictates that serious offences must be punished by at least four years of deprivation of freedom or a more serious offence. In that South African courts have imposed penalties consisting merely of fines, the current national legislation allows the evasion of South Africa’s international obligations and must be addressed.

5.2.6. Extraterritorial jurisdiction

The international obligations upon states in respect of jurisdiction are regulated by the Convention.⁴⁶⁶ The Palermo Protocol does not add further requirements in respect of jurisdiction. As such, South Africa is obliged to ensure its legislation provides general territorial jurisdiction over offences of trafficking committed within its borders and that it has the necessary extraterritorial jurisdiction to prosecute trafficking crimes committed outside of its borders by South African nationals that are present in South African territory and not being extradited on grounds of nationality. From article 15(4) and 16(10) of the Convention, the extraterritorial jurisdiction that a state *must* establish is limited by the following two limitations:

1. the suspected trafficker is a national of the state in whose territory such suspect is present; and

⁴⁶⁴ United Nations Global Initiative to Fight Human Trafficking “The Vienna Forum Report: a Way Forward to Combat Human Trafficking” (2008) 36.

⁴⁶⁵ Article 9 of the Model Law 31.

⁴⁶⁶ Article 15 of the Convention. See the discussion in 2.1.1.3.1 above.

2. the suspect is not being extradited by such state on the grounds of his/her nationality.

South Africa provides for its courts to have jurisdiction over trafficking offences committed abroad by way of section 12 of the Trafficking Act. The South African jurisdiction is, however, limited to offences that meet *any* of the following requirements:

- “(a) *is a citizen of the Republic;*
- (b) *is ordinarily resident in the Republic;*
- (c) *has committed the offence against a citizen of the Republic or a person who is ordinarily resident in the Republic;*
- (d) *is, after the commission of the offence, present in the territory of the Republic, or in its territorial waters or on board a ship, vessel, off-shore installation, a fixed platform or aircraft registered or required to be registered in the Republic;*
- (e) *is, for any reason, not extradited by the Republic or if there is no application to extradite that person; or*
- (f) *is a juristic person or a partnership registered in terms of any law in the Republic.”⁴⁶⁷*

South Africa meets the requirement as set out by the Convention. South Africa broadens its extraterritorial jurisdiction, as mandated by article 15(3) of the Convention, by not only precluding jurisdiction beyond its borders in terms of the internationally required two limitations, but adds further means of establishing jurisdiction and does not have a condition that any two requirements need be present at the same time. South Africa, therefore, has the means to exercise jurisdiction over a matter in terms of its domestic law where the suspect is a South African citizen whether or not such suspect is present in the republic's territory or not. South Africa accordingly exceeds its international obligation in this respect.

5.2.7. **Confiscation and other procedures in respect of proceeds of crime**

Party states' obligation to confiscate crime proceeds and instrumentalities is imposed by article 12 of the Convention. The Palermo Protocol fails to supplement the Convention obligations with any specific provisions of its own and, as such, the Convention minimum requirements are what states are to adhere to. The Convention dictates that all proceeds from crime as well as instrumentalities used in the execution of the offences are to be confiscated. Article 12(2) of the Convention further require states to provide measures as may be necessary to secure the identification, tracing, freezing, seizing and consequent confiscation of these items. Articles 13

⁴⁶⁷ Section 12(1) of the Trafficking Act.

and 14 of the Convention refer to the cooperation required between states to secure cross-border confiscation of the crime proceeds or instrumentalities.

South Africa's Trafficking Act does not include provisions on confiscation of crime proceeds or instrumentalities of the crime. However, the Prevention of Organised Crime Act 121 of 1998 ("POCA") contains the requisite provisions in compliance with the Convention's dictates.⁴⁶⁸ Part II of POCA includes provisions that ensure the confiscation of proceeds from *any* criminal activities, provisions that determine the procedure in relation to confiscation orders and the values of proceeds. As evidence of South Africa's compliance with its international obligations, Kruger refers to the South African case of *S v Sayed and Another* in which a conviction of crimes of trafficking was obtained under the provisions of POCA.⁴⁶⁹ South Africa's national legislation comprehensively addresses the matter of confiscation of crime proceeds and property used in facilitation of the crime. South Africa's anti-trafficking legislation does not include any measure to identify, trace, freeze or seize crime proceeds that is to be confiscated. The national legislation also neglects to specifically refer to procedures in respect of international cooperation or requests to confiscate property across borders. However, the provisions in respect of the latter two matters are not peremptorily required by the Convention. The tracing and seizure provisions are required as they may be necessary within each state's context. The cooperative request to confiscate is not required to be legislated or provided for in another manner. It can, therefore, be regulated on the basis of the Convention. The absence of these provisions does not render South Africa non-compliant in respect of the international confiscation obligation. The comprehensive provisions on confiscation and forfeiture included in POCA render South Africa fully compliant with the international requirements in this regard.

5.3. Conclusion

The South African Trafficking Act criminalises all of the offences that are internationally required of it so meeting the obligation to criminalise in accordance with article 5 of the Palermo Protocol. Specifically, the Trafficking Act's definition of trafficking in persons, as set out in section 4(1) of the Trafficking Act, greatly mirrors, and even broadens, the prohibited actions and prohibited means criminalised from that which is prescribed by the Trafficking Act. There are, however, some grave concerns with the definition of trafficking in persons that would need to be addressed. The greatest concern is that the Trafficking Act does not provide for the non-application of the prohibited means element in respect of child victims. The definition is further sufficiently broad so as to criminalise the full scope of prohibited conduct. The Trafficking Act

⁴⁶⁸ Sections 18 to 24 of POCA regulate the confiscation of proceeds generated through crime. Sections 38 to 47 provide for preservation of property orders while sections 48 to 62 regulate asset forfeiture proceedings.

⁴⁶⁹ Kruger *Combating Human Trafficking* 542. *S v Sayed and Another* is an unreported case with case number: 041/2713/2008. Judgment was delivered on 18 March 2010 in the Durban Regional Court.

further succeeds in prohibiting the required ancillary crimes including debt bondage and forced labour. It is further submitted that the Trafficking Act contains sufficient measures to criminalise the unlawful execution of cultural traditions such as *ukuthwala* or *lobola*. The Trafficking Act establishes a less stringent obligation on commercial carriers than is issued by the Palermo Protocol. Although meriting mention, this is not a difference that will render South Africa in breach of its international requirements. Further, the sanctions implemented by South Africa, can potentially be adequate, but by deviating from the maximum sentences in favour of mitigating circumstances, South African courts have attracted major critique. The implementation of these sanctions must be considered. The Trafficking Act in conjunction with the rest of South Africa's legal framework provides for cooperation and extradition rights between states which further strengthen South Africa's prevention efforts. As such, South Africa meets the requirement to prevent trafficking from a Palermo Protocol perspective.

The South African legislation further provides substantial measures to protect and assist victims of trafficking as is called for by the Palermo Protocol. However, South Africa should urgently align its immigration laws with the Trafficking Act. Practical implementation of these laws have led to trafficking victims being extradited summarily without South Africa applying the protective and assistive measures internationally required of it and as set out in the Trafficking Act.⁴⁷⁰ This position has been internationally criticised and must urgently be addressed.⁴⁷¹

Apart from the above mentioned matters in respect of which the Trafficking Act should be clarified for the sake of improving implementation of the Protocol as well as strengthening South Africa's efforts to effectively curb the trafficking phenomenon, South Africa's legislative framework successfully meets the international obligations of the Palermo Protocol to prevent, combat and suppress trafficking in persons. Specifically, South Africa satisfies the obligation to criminalise trafficking, as internationally defined by promulgation of the Trafficking Act. However, South Africa will need to make certain amendments to its legislation in order to ensure full compliance.

⁴⁷⁰ Section 15-17 of the Trafficking Act.

⁴⁷¹ The United States Department of State 2018 Trafficking in Persons report <<https://www.state.gov/j/tip/rls/tiprpt/countries/2018/282748.htm>> (accessed 30 November 2018).

6. The element of *mens rea* as required by the Trafficking Act

Internationally, South Africa is only required to criminalise intentional acts of trafficking committed with the specific intention to exploit victims.⁴⁷² However, member states have the judicial freedom to provide for a lower standard of *mens rea* should it feel it necessary to do so. In light of the requirement to implement legislative measures to prevent and combat the prevalence of trafficking in its jurisdiction, it is submitted that states might have to provide for lesser forms of *mens rea* to ensure compliance with the substance rather than the letter of the law.

The Trafficking Act's required *mens rea* mimics the international definition:

“4. (1) Any person who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic, by means of—

- (k) a threat of harm;*
- (l) the threat or use of force or other forms of coercion;*
- (m) the abuse of vulnerability;*
- (n) fraud;*
- (o) deception;*
- (p) abduction;*
- (q) kidnapping;*
- (r) the abuse of power;*
- (s) the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or*
- (t) the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage,*

*aimed at either the person or an immediate family member of that person or any other person in close relationship to that person, for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons.”*⁴⁷³

The South African definition imports a similarly high form of intent in the sense that it also requires that the offender must commit the prohibited trafficking acts with the *purpose to exploit*. In the international arena, this form of intent is described as *dolus specialis*, which includes the *dolus directus* form of intent. It is envisaged that both *dolus indirectus* as well as *dolus eventualis* could qualify under this prescribed intent, the intent to exploit. However, the Trafficking Act differs from the Palermo Protocol in that the Palermo Protocol requires states to criminalise

⁴⁷² Refer to the discussion under chapter 3 above.

⁴⁷³ Section 4(1) of the Trafficking Act. Article 3(a) of the Palermo Protocol uses the wording “*for the purpose of exploitation*”.

intentional conduct.⁴⁷⁴ The Trafficking Act does not succinctly specify that intention is the only form of *mens rea* that will be sufficient for criminalisation of trafficking. However, whether negligence or any other lesser form of *mens rea* would be capable of satisfying the required *dolus specialis* is uncertain. Can a person be found to have negligently exploited another? The question of whether negligence or lower derivative fault forms would apply must be further investigated in the context of the South African legal framework in respect of *mens rea*.

6.1. The South African legal framework

South African criminal law provides that the fault element can be met by proving either *dolus* (intent) or *culpa* (negligence), subject to the specific requirements of the crime.⁴⁷⁵ Negligence will not be sufficient to satisfy the fault requirement in all instances. *Dolus* can consist of either *dolus directus*, *dolus indirectus* as well as *dolus eventualis*. In order to establish *dolus* a subjective inquiry into the state of mind of the accused will be held.⁴⁷⁶ The accused must have intention and knowledge of the unlawfulness of his/her actions in respect of all the other elements of the crime.⁴⁷⁷ With this knowledge, the accused must further accept and apply his/her will towards the fulfilment of the acknowledged action. Negligence on the other hand rests on the objective standard of the reasonable person.⁴⁷⁸ If the actions of the accused are found not to conform to the objective standard of what can be expected from a reasonable person in similar circumstances, the accused will be found to have acted negligently and, as such, to have been at fault in cases where negligence is sufficient for liability.

The question of whether negligence is a sufficient form of fault in respect of an offence will be determined with reference to the definition of the crime itself. In respect of common law offences, negligence was historically only punished in cases where it resulted in the death of a person.⁴⁷⁹ In respect of statutory crimes, our courts have accepted that negligence can constitute the

⁴⁷⁴ Article 5(1) of the Palermo Protocol states: “Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.”

⁴⁷⁵ For example, murder requires *dolus* but has a “*culpa*-counterpart” in the crime of culpable homicide. However, assault requires *dolus* and does not have a similar “*culpa*-counterpart”; S Karriem “Elevating Culpa to Crime” (2015) 9 DR 40.

⁴⁷⁶ Burchell *Principles of Criminal Law* 5 ed 348-349.

⁴⁷⁷ Burchell *Principles of Criminal Law* 5 ed 349.

⁴⁷⁸ Burchell *Principles of Criminal Law* 5 ed 416.

⁴⁷⁹ A further common law crime for which negligence has judicially been accepted as satisfying the required fault element is contempt of court; Burchell *Principles of Criminal Law* 5 ed 28-32, 430; Where death is the result of a person’s negligent conduct, such person can be guilty of culpable homicide. For a view that negligence should be accepted as sufficient form of fault for other common law crimes, see Karriem S “Elevating Culpa to Crime” (2015) 556 DR 40 40-41.

satisfactory form of *mens rea*.⁴⁸⁰ Burchell indicates that this approach was adopted by South African courts so as to steer away from the strict liability doctrine in respect of conduct contravening statutory provisions.⁴⁸¹ The finding of the court in *Van Zyl* was based on a rule that failing a clear indication that negligence is a sufficient form of fault in the statute, intention (*dolus*) will be the exclusive sufficient form of fault. This has been criticised by certain academic writers.⁴⁸² Nonetheless, it appears that South African courts will not lightly infer negligence as a form of fault in case of a statutory crime and require “the clearest indications in the Act justifying the extension of criminal liability”.⁴⁸³ In determination of whether such a clear indication exists, Burchell lists a set of factors that can be utilised in this examination, such as the language of the Act, the scope and object thereof, the implementation of the statute, the penalties involved as well as the reasonableness of criminalising negligence in the circumstances of the offence.⁴⁸⁴ This clarifies that an Act can still be seen to clearly indicate that negligence is a sufficient form of fault for the statutory offence even though the language does not state it explicitly. It is submitted that the question of whether trafficking in persons, as defined in section 4 of the Trafficking Act, can be performed negligently, must be answered with reference to the totality and specific language of the Trafficking Act and the application of these factors in respect thereof. In order to answer this question, the relevant factors will be analysed and applied to the Trafficking Act provisions below.

6.2. Negligence as form of fault in terms of trafficking in persons as defined in the Trafficking Act

While it is clear that fault is a requirement of the statutory trafficking offence and that it is not a strict liability offence, the Trafficking Act is not explicit on whether negligence will or will not be a sufficient form of such fault. Therefore, an inquiry into whether clear indications that negligence will suffice exists in the Trafficking Act, must be done.

6.2.1. Factor 1: Language of the Trafficking Act

The golden rule of interpretation dictates that the plain meaning of the words used should be applied in interpreting the legislation, unless it leads to an absurdity.⁴⁸⁵ The wording used by the

⁴⁸⁰ *R v H* 1944 AD 121 130; *R v Federated Meat Industries Limited* 1949 2 SA 795 (N) 797; *S v Naidoo* 1974 (4) SA 574 (N) 576. Burchell *Principles of Criminal Law* 5 ed 430-431.

⁴⁸¹ Burchell *Principles of Criminal Law* 5 ed 430.

⁴⁸² A Pantazis *Annual Survey of South African Law* (2000) 689; Burchell *Principles of Criminal Law* 5 ed 430; Kruger *Combating Human Trafficking* 518.

⁴⁸³ *S v Naidoo* 1974 (4) SA 574 (N) 596H.

⁴⁸⁴ Burchell *Principles of Criminal Law* 5 ed 432-433.

⁴⁸⁵ LM Du Plessis *The interpretation of statutes* 3 ed (1986) 35.

legislature in criminalising the main offence of trafficking in persons as well as the related crimes is clear in respect of certain crimes and less clear in respect of others. Although the offence of trafficking in persons as defined in section 4(1) of the Trafficking Act is the focus of this enquiry, the language used by this Act in respect of other offences created in terms thereof also provides valuable insight into the legislature's intention.

Section 4(1) of the Trafficking Act provides no explicit wording, such as "intentionally" or "knowingly" as is provided in many of the other criminalising sections, to indicate what form of fault is required.⁴⁸⁶ The only indication as to the required fault is that the prohibited actions achieved by the prohibited means must be done "for the purpose of any form or manner of exploitation".⁴⁸⁷ In criminalising the section 4(2) offence, the legislature uses similar language in that it requires the prohibited actions to be performed "for the purpose of exploitation of that child or person". The question is then whether an accused can act negligently while acting for the purpose of exploitation.

The wording of section 4(1) indicates that the fault required by the offence entails two elements: firstly, that the prohibited actions must have been committed with purpose and, secondly, that such purpose must be to exploit the victim.

Purpose can be defined as:

*"the intention, aim, or function of something; the thing that something is supposed to achieve"*⁴⁸⁸

When one considers this definition, it is clear that the word "purpose" bears a similar meaning to that of "intention". The section 4(1) definition could be construed to read: where the prohibited actions achieved by the prohibited means are performed with the intention of exploitation of the victim, the person is guilty of the offence of trafficking in persons.⁴⁸⁹

Upon further consideration of what constitutes "exploitation" for purpose of the Trafficking Act, it is clear that an element of intention is at play when an accused harbours a purpose of exploitation. The terms included as forms of exploitation such as "slavery", "servitude", "forced labour" or "impregnation of a female person against her will for the purpose of selling her child" all include actions or results that are intended. Therefore, the use of the words "for the purpose of exploitation" can be seen as "clear indication" that the legislature requires the prescribed acts

⁴⁸⁶ Section 5, 6, of the Trafficking Act.

⁴⁸⁷ Section 4(1) of the Trafficking Act.

⁴⁸⁸ Oxford Learner Dictionary

<https://www.oxfordlearnersdictionaries.com/definition/american_english/purpose> (accessed 13 June 2019).

⁴⁸⁹ SA Law Reform Commission *Discussion Paper 111 Project 131 Trafficking In Persons* (2006) 15, 26, 38, 66.

to be conducted with intention and that such intention required is further clearly defined as an intention to exploit. It is thus concluded that the language of section 4(1) of the Trafficking Act does not provide that negligence will be a sufficient form of fault to constitute trafficking.

What is notable, however, is that the legislature appears to use different language in terms of fault in the remainder of chapter 2 of the Trafficking Act in creation of the further trafficking-related offences. In the majority of these sections, the legislature expressly states which form of fault it requires.⁴⁹⁰ The legislature uses the word “intentionally” when importing liability based on intention or words relating to negligence such as “became aware or ought reasonably to have known or suspected” where it seems to import negligence as sufficient form of fault. It is suggested that the same clarity be added to the section 4(1) and 4(2) offences in order to harmonise the legislation. The lack of specific inclusion of similar fault-importing language in sections 4(1) and 4(2) leaves the door of dispute or uncertainty wide open in relation to the fault required by these sections. This weakness, in turn, could undermine the legality principle that is such a foundational principle in criminal law.

Section 2 of the Trafficking Act is further relevant in considering the legislature’s intention to criminalise negligent conduct.⁴⁹¹ Section 2 sets out how the court will infer the existence of certain elements of what would generally form part of an enquiry in establishing negligence. By providing these provisions, it is clear that the legislature intends to provide negligence as sufficient fault in respect of certain offences.⁴⁹² It has, however, not done so in respect of the

⁴⁹⁰ See for example section 5 to 10 of the Trafficking Act.

⁴⁹¹ Section 2 reads:

“Interpretation of certain expressions

2. (1) *For purposes of this Act, a person is regarded as having knowledge of a fact if—*

- (a) *that person has actual knowledge of the fact; or*
- (b) *the court is satisfied that—*
 - (i) *the person believes that there is a reasonable possibility of the existence of the fact; and*
 - (ii) *the person has failed to obtain information to confirm the existence of that fact, and “knows” or “knowing” must be construed accordingly.*

(2) *For purposes of this Act, a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both—*

- (a) *the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and*
- (b) *the general knowledge, skill, training and experience that he or she in fact has.*

(3) *A reference in this Act to any act, includes an omission and “acting” must be construed accordingly.”*

⁴⁹² Sections 8 and 9 of the Trafficking Act.

offence of trafficking in persons as defined in section 4(1) by way of the language of the Trafficking Act.⁴⁹³

6.2.2. Factor 2: Scope and object

The Trafficking Act's scope and object is to prevent, suppress and combat all forms of trafficking in persons.⁴⁹⁴ Trafficking of persons is generally seen as a process rather than an isolated incident. This could lead to a number of persons being part of the process of trafficking through their performance of one contributory act. Unless each person is aware of the full process in which they are involved, they will not have the required intent in respect of the full trafficking process.⁴⁹⁵ Naturally, this is a legislative point on which organised crime syndicates prey. The question is whether the conduct of one such person should perhaps be criminalised in order to achieve the object of combating trafficking in persons. Can this person's conduct, intentional or negligent, that constitutes one link of the trafficking chain, perhaps make such person negligently liable in respect of the full trafficking process? It is submitted that where a reasonable person, in the same circumstances:

1. would have foreseen the reasonable possibility of his conduct being part of a trafficking in persons process;
2. would have taken steps to guard against that possibility; and
3. such person failed to take the steps that they would reasonably have taken to guard against the possibility,

such person should be guilty of trafficking in persons.

The Trafficking Act criminalises certain conduct that facilitates trafficking in persons and provides that negligence would in certain cases be sufficient to impute liability.⁴⁹⁶ Section 10 also criminalises involvement in offences in chapter 2 of the Trafficking Act.⁴⁹⁷ By criminalising

⁴⁹³ If it is accepted that a person can negligently partake in trafficking, as argued below, one line of thought in understanding the legislature's failure to provide express guidance in respect of the fault form in section 4(1) or 4(2) could be that it intended for negligence to be sufficient form of the crime by exclusion of the words "intentionally". This would contradict the rule that presumes the legislature to have intended intent as exclusive form of fault unless it has clearly indicated otherwise. This line of reasoning is further contradicted by the clear train of thought in the SA Law Reform *Discussion Paper 111 Project 131 Trafficking In Persons* (2006) where intention to exploit is clearly the focus of the conduct to be criminalised.

⁴⁹⁴ See sections 3(a), (b), (c), (f) and (g) of the Trafficking Act.

⁴⁹⁵ The rule of contemporaneity and/or the rule that an accused must have the required fault in terms of all the other elements of the crime could preclude intent in such cases.

⁴⁹⁶ Section 8 and 9 of the Trafficking Act.

⁴⁹⁷ Section 10 reads:

"Involvement in offences under this Chapter

involvement in offences in terms of chapter 2, the same form of fault as required for the relevant offence would be required of the involved person. Negligent involvement as envisaged above would remain outside of the scope of criminalised conduct. It is suggested that provision be made for a broader category of conduct to be criminalised. Instead of only prohibiting specified facilitative acts, such as leasing of property or carrying persons that are suspected victims of trafficking, provision should be made that any act facilitating, any act assisting or any form of involvement in the trafficking of a person, albeit without knowledge of the full process, while knowing or having to ought reasonably have known that such act would lead to the trafficking of a victim, should be criminalised. It is submitted that if South Africa wishes to meet the object of the Trafficking Act to prevent and combat (all forms of) trafficking within its jurisdiction, it will have to provide that the above negligent trafficking also be prohibited. As such, the object and scope of the Trafficking Act seem to indicate that negligent trafficking in persons should also be criminalised.

6.2.3. Factor 3: Implementation

It is submitted that the implementation of the Trafficking Act will be facilitated by including negligence as fault element in that a wider scope of conduct will be prevented and combated.

6.2.4. Factor 4 and 5: Penalty and Reasonableness

The penalty for trafficking in persons in terms of section 4(1) of the Trafficking Act is severe, indicating the seriousness of the crime. The severity of the penalty generally indicates that the legislature intends to punish the intentional commission of the prescribed acts. When one considers murder, for which the highest penalty can be imposed by a court, the required form of *mens rea* is strictly intention.⁴⁹⁸ The negligent killing of another would not be sufficient to warrant conviction on a charge of murder. However, murder has a *culpa*-counterpart in the form of culpable homicide. The sole difference between these two offences, and the consequent penalties, is the required *mens rea* in each case. It is submitted that due to the seriousness of the result, the death of another, caused by these offences, public policy dictates that both the intentional and negligent causing of a person's death be criminalised and punished. Burchell confirms that the rationale for criminalising negligent conduct, such as in the case of culpable

10. (1) *Any person who—*

- (a) *attempts to commit or performs any act aimed at participating in the commission of;*
- (b) *incites, instigates, commands, directs, aids, promotes, advises, recruits, encourages or procures any other person to commit; or*
- (c) *conspires with any other person to commit,*
an offence under this Chapter is guilty of an offence."

⁴⁹⁸ Karriem (2015) DR 40.

homicide or various other public policy offences, is based on the predominant purpose of the criminal law, that society should be protected from the infliction of harm.⁴⁹⁹ This rationale must at all times be balanced with the pursuit of justice and fairness to the individual.⁵⁰⁰ This study suggests that there are a majority of factors of public interest and collective welfare that justify, or even require, the criminalisation of negligent trafficking of persons. Factors to be taken into account include:

- the grave harm inflicted to the victim, breaching most fundamental human rights such as privacy, bodily integrity, freedom and dignity;
- the grave harm inflicted to society, or a community as a whole, bringing about the influx of further crime; and
- that traffickers prey on the most vulnerable of society who requires the law to protect them.

Further considering that bribery and corruption are further exemplary offences the criminalisation of which serves the protection of the public interest, by prohibiting the damaging effect thereof on the free-market economy,⁵⁰¹ whilst taking cognisance of the fact that trafficking in persons generally entail corrupt activities, money laundering or bribery, it is submitted that trafficking in persons can also be treated as prosecutable in protection of similar public interests. It is, therefore, sufficient to say that public interest dictates that both negligent trafficking in persons should be criminalised. Based on public policy, Karriem argues that it is an anomaly that certain seriously harmful crimes such as assault or assault to grievous bodily harm lack a culpa-counterpart in the way murder has culpable homicide.⁵⁰² In addressing this legal *lacuna*, it is suggested that negligent trafficking be included under the ambit of prosecutable trafficking in persons. Based on public policy, it is argued that a court could most probably infer this criminalisation from the provisions of the Trafficking Act. However, doing so could attract serious critique from scholars supporting the doctrine of strict interpretation of the language of the statute, which, in all likelihood, can be expected to prevail in South African courts. In order to avoid potential dispute or breach of the legality principle, it is strongly suggested that the inclusion of negligent trafficking in persons be clarified in the Trafficking Act.

6.2.5. Conclusion

In considering the above elements of the inquiry into whether the statutory offence provides that negligent conduct will be sufficient for conviction on a count of trafficking in persons in terms of

⁴⁹⁹Burchell *Principles of Criminal Law* 5 ed 324.

⁵⁰⁰ 324.

⁵⁰¹ 805.

⁵⁰² Karriem (2015) DR 40.

section 4(1) of the Trafficking Act, in totality, they appear to indicate that negligence should be included, but have not been included as such. On a strict interpretation of the language, the legislature has not included negligence as a form of fault for the section 4(1) offence. Negligence has rightly been included for most of the further related trafficking crimes.

“...a fair and just system of criminal liability is best based on psychological fault with a healthy mixture of normative fault in the context of the most serious crimes (homicide), the most stressful individual predicaments (eg compulsion and domestic violence) and in statutory offences (of a regulatory nature, such as pertaining to health and safety) where collective welfare may demand the highest standards of care and where negligence may, in any event, be sufficient for criminal liability.”⁵⁰³

In light of the fact that this study suggests that negligent trafficking could occur and “*may, in any event, be sufficient for criminal liability*” and that the interests of collective welfare dictate so, it is suggested that the scope of criminalised trafficking in persons and related conduct be broadened to include negligent conduct.

6.3. Presumption of an exploitive purpose

Section 4(1) of the Trafficking Act requires the accused to have the intention to exploit the victim of its trafficking acts.⁵⁰⁴ In order to secure a conviction on a count of trafficking in persons, the prosecution would be required to prove that the accused had this high standard of intention even after the prosecution have succeeded in proving that the accused committed the prohibited action, or actions, by means of the prohibited method, or methods. This could burden the prosecution's task unnecessarily. It is suggested that thought should be given to the insertion of a presumption that would impute the required fault to an actor in the required circumstances. Although presumptions that a person intends the probable consequences of his or her conduct no longer exist in South African criminal law, the court has held that rebuttable presumptions are in limited cases constitutionally acceptable.⁵⁰⁵ The courts have indicated its constitutional disapproval of presumptions that create reverse onuses, but have allowed presumptions that do not reverse the prosecution's onus to prove, beyond reasonable doubt, all the elements of a crime.⁵⁰⁶ A good example is the presumption set out in section 24 of the Prevention and Combatting of Corrupt Activities Act (“PCCA”). This provision infers corrupt intention, when the state has proven that gratification was given to a particular person and that the state has, despite taking reasonable steps to link such gratification to a lawful authority or excuse on the part of

⁵⁰³Burchell *Principles of Criminal Law* 5 ed 344.

⁵⁰⁴ See the discussion at 6.2.1 above.

⁵⁰⁵ Burchell *Principles of Criminal Law* 5 ed 378-379; *S v Mokonto* 1971 2 SA 319 (A) 325E-G.

⁵⁰⁶ *Selebi v S* 2012 1 SACR (SCA) 9; Burchell *Principles of Criminal Law* 5 ed 808.

the person charged, failed to do so and there is no evidence to the contrary. Section 24 has been accepted as constitutionally compliant in *Selebi*.⁵⁰⁷

A similar rebuttable presumption could aid the prosecution in cases of trafficking. The following rebuttable presumption is suggested:

If it is proven that a person:

1. *has been delivered, recruited, transported, harboured, sold exchanged, leased or received by another person within or across the borders of the Republic by means of,*
2. *a threat of harm, the threat or use of force or other forms of coercion, the abuse of vulnerability, fraud, deception; abduction, kidnapping, the abuse of power, the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over that person, or the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage aimed at either the person or an immediate family member of that person or any other person in close relationship to that person; and*
3. *that person was exploited or would most probably have been exploited as a result of 1 and 2; and*
4. *the prosecution has taken reasonable steps to ascertain a lawful reason, if possible, that such other person was not responsible for such exploitation and could find none that establish reasonable doubt,*

in the absence of evidence to the contrary which raises reasonable doubt, that sufficient evidence has been established to prove, beyond reasonable doubt, that such other person did so for the purpose of exploitation of that person.

A further presumption that could be used in establishing the required fault in respect of conduct facilitating trafficking could be included:

If it is proven that a person:

1. *has been delivered, recruited, transported, harboured, sold exchanged, leased or received by another person within or across the borders of the Republic by means of,*
2. *a threat of harm, the threat or use of force or other forms of coercion, the abuse of vulnerability, fraud, deception; abduction, kidnapping, the abuse of power, the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over that person, or the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage aimed at either the person or an*

⁵⁰⁷ *Selebi v S* 2012 1 SACR (SCA); G Kemp, S Walker, R Palmer, S Baqwa, C Gevers, B Leslie, A Steynberg *Criminal Law in South Africa* 3 ed (2018) 474-475.

immediate family member of that person or any other person in close relationship to that person; and

3. *that other person was found to be in possession of the travel or identification documentation of that person; and*
4. *the prosecution has taken reasonable steps to ascertain a lawful reason, if possible, as to why that other person was found to be in possession of that person's travel or identification documentation and could find none which are lawful,*

in the absence of evidence to the contrary which raises reasonable doubt, that sufficient evidence has been established to prove, beyond reasonable doubt, that such other person intended to facilitate the trafficking of such person.

It is submitted that the above presumptions could lighten the evidentiary burden on the prosecution without reversing the onus to prove all the elements of the trafficking offence.

6.4. Conclusion

The Trafficking Act requires a high standard of *mens rea* in order to establish the offence of trafficking in persons. Section 4(1) specifically requires the accused to perform the prohibited actions by the prohibited methods with the intention to exploit the victim. As such, intention (*dolus*) is required and the negligent trafficking of a person is not prohibited in terms of the Trafficking Act. Although certain specific further conduct that facilitates trafficking can be conducted negligently, these acts are limited to specifically listed sets of conduct such as the leasing of premises used for trafficking and the carrying of passengers that are suspected of being trafficking victims. As such, the Trafficking Act fails to prohibit negligent conduct that facilitates trafficking in a broad sense. It is suggested that a provision to section 8 be added to remedy this *lacuna*. The Act further criminalises intentional involvement in trafficking but again fails to provide that negligent involvement in the trafficking offence be criminalised. As set out above, it is clear that a person can negligently traffic a victim when that person reasonably would have foreseen the reasonable possibility of his conduct being part of a trafficking in persons process, would have taken steps to guard against that possibility and such person failed to take the steps that they would reasonably have taken to guard against the possibility (of the trafficking). This is, therefore, a further legislative lack that should be remedied in order to prevent and combat the prevalence of trafficking in South Africa. Based on the grave impact that trafficking in persons has on victims and society alike, public policy interests dictate that this harsh offence also be criminalised when committed negligently. This chapter further suggests that certain rebuttable presumptions in respect of fault, similar to that provided in the PCCA, be added to the legislation in order to lighten the already heavy evidentiary burden on the prosecution in trafficking cases. This will ensure that all forms of intentional as well as reasonable negligent cases of trafficking in persons be prohibited. Although these amendments

will result in South Africa further exceeding its international requirements which are limited to the criminalising of intentional conduct, South Africa must ensure it employs measures that will ultimately satisfy the greater international obligation, and the Trafficking Act's own purpose, of preventing and combating this grave crime of trafficking in persons.

7. Conclusion and recommendations

This study considered the South African legislative framework against the framework created by the Convention and Palermo Protocol in ascertaining whether the South African framework complies with the international requirements. The South African legal position pre-Trafficking Act, consisting of the common law and statutory provisions regulating trafficking in persons, as well as the change brought about by the Trafficking Act were analysed with specific reference to the obligation to criminalise the long-awaited, internationally-defined “trafficking in persons” offence as part of the requirement to prevent, suppress and combat trafficking in persons. South Africa’s trafficking response was considered in light of the three international obligations: to criminalise the prohibited trafficking offence, to protect and assist the victims of trafficking and to prevent the further prevalence of the trafficking in persons. The newly promulgated definition of trafficking in persons as criminalised in terms of the new Trafficking Act was compared to the international trafficking in persons definition. The main findings of this comparison indicate that the South African legal response to the trafficking phenomenon contains all the elements to conceptually and predominantly meet and, in certain aspects, wholly exceed the international requirements. The statutory provisions of the Trafficking Act sufficiently contain the minimum prescribed elements in criminalisation of the trafficking offence. The “trafficking in persons” definition as set out in section 4 of the Trafficking Act includes the conduct prescribed by the Palermo Protocol and goes beyond the minimum definition by prohibiting more actions and more means as well as extending the exploitative purposes listed in the definition. As such, this domestic definition is internationally compliant. The major shortfall of the Trafficking Act, however, lies therein that it does not delete the prohibited means element in cases of trafficking of child victims. As this constitutes a breach of the obligation to criminalise the minimum prescribed conduct where the victim is younger than eighteen years of age, South Africa could be found non-compliant in respect of the trafficking of minors. Beyond this failure, the Trafficking Act together with the existing statutory and common law provisions create a broad net with which a multitude of conduct that either constitute or form part of the fragments of the trafficking process can be prevented, combated and suppressed. As such, it can be stated that South Africa meets the Palermo Protocol’s obligations, and even some of its suggestions, to implement legislative measures in combat and prevention of trafficking. Although this framework is extensive and predominantly all-encompassing, certain improvements can be made. This study of the Trafficking Act and the existing legal framework available for the combat of the complex trafficking process has shed light on certain shortcomings or points open for improvement in this legal framework. In certain regards, the legislation fails to provide the required structure to adhere to the international standard while in other respects the practical application of the law results in outcomes that is not internationally acceptable. The following recommendations suggested to remedy these shortcomings are discussed below.

7.1. The Trafficking Act definition of trafficking in persons

As mentioned above, the major shortcoming of the Trafficking Act is that it fails to waive the element of the prohibited means in respect of victims that are children. Although the legislature seems to deal with this it fails to remove the element as part of the trafficking crime where the victim is a child. Effectively, what is defined as trafficking of a child in the South African context does not include the full scope of trafficking acts that is required to be criminalised by the Palermo Protocol. Further, this element remains part of the prosecution's onus to prove in securing a conviction before the accused can raise any defence in respect of consent to refute the prohibited means evidence. It is strongly recommended that this shortcoming be remedied by excluding the requirement that the prohibited trafficking action be achieved by way of prohibited means. This can be achieved by the addition of a provision similar to that of article 3(c) of the Palermo Protocol in section 4 of the Trafficking Act. Such waiver will greatly reduce the prosecution's evidentiary burden in this regard and not render South Africa in breach of the international criminalisation obligation in respect of trafficking of children.

A further *lacuna* in the Trafficking Act relates to the people against whom the prohibited means can be effected in order to render the action prosecutable. The Palermo Protocol requires that the implementation of the prohibited means in obtaining the consent of a person for the trafficking of a victim be prohibited where that person has "control" over the trafficking victim.⁵⁰⁸ The Trafficking Act only prohibits the methods when it is applied against 1) the person to be trafficked or 2) a person in a close relationship to that person. This study has shown that the standard of "close relationship" is far below that of "control" in respect to this provision and would exclude certain crucial relationships that could generally form part of the trafficking process. It is, therefore, recommended that this reference in section 4(1) of the Trafficking Act be amended by the addition of the words "*or any person having control over that person*" in the section so that it reads:

*"aimed at either the person or an immediate family member of that person, ~~or~~ any other person in close relationship to that person or any person having control over that person, for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons."*⁵⁰⁹

The Trafficking Act provides a definition of "abuse of vulnerability" that is defined with reference to the subjective mindset of the victim. The Model Law advises that this be avoided as it further increases the already heavy evidentiary burden. In accordance with the Model Law, it is recommended that the subjective test centred on what the victim believes rather be removed. Two suggestions are made in this respect. The first is that the definition of the term "abuse of

⁵⁰⁸ Section 3 of the Palermo Protocol.

⁵⁰⁹ Underlined words represent inclusions and words crossed through represent words that are removed.

vulnerability” merely requires the presence of a vulnerability and that such vulnerability was taken advantage of by the accused in trafficking of the victim.⁵¹⁰ The further suggestion is that a presumption be created that where the existence of a vulnerability is proven and it is proven that the vulnerability was taken advantage of it be presumed to be causally linked to the trafficking of the victim, where not already clearly evidenced. Such a presumption could be constitutionally challenged. However, it is submitted that any such constitutional challenge would be refuted based on the fact that the infringement of the right would meet the requirements for justification as provided by section 36 of the Constitution. Although less material, it is also recommended that the list of vulnerabilities in this definition be extended to include physical or mental disease that is not a disability. Further, even though the vulnerability list is not exhaustive it is suggested that an all-inclusive provision of “any other factors” be added for the sake of completeness and legality.

In order to further curb potential problems with the length of the definition as well as with limiting the risk of confusion, it is suggested that the section 4(1) trafficking definition sections (i) and (j) be combined to read:

- (i) the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage, including the direct or indirect giving or receiving of any such advantage to obtain the consent of a person having control or authority over another person;

This is a non-material amendment but would amount to a legislative improvement which would cancel out the confusion and possible dispute arising from the similarity of these two sub-provisions.

7.2. Obligation on commercial carriers

In order to regulate all trafficking related matters in one document, it is suggested that the Trafficking Act’s obligation on commercial carriers be aligned with the corresponding obligation in terms of the Palermo Protocol so that section 9(1) of the Trafficking Act reads:

9(1) A carrier who transports a person within or across the borders of the Republic, must verify that such person is in possession of the identity and/or travel documentation required to enter or depart from the Republic of South Africa and any transit countries.

Failing this, the obligation placed on commercial passenger carriers differs wholly from that under the Palermo Protocol. Under scrutiny, failing other measures or legislation requiring

⁵¹⁰ Article 5(1)(a) of the Model Law 9.

commercial carriers to ascertain whether their passengers are in possession of the prescribed documents, this difference will render South Africa non-compliant.

7.3. Obligation to protect and assist victims

South Africa's Trafficking Act adequately affords victims of trafficking the required protective and assistive measures. These provisions are lauded as exceeding the minimum requirements in establishing a comprehensive legal framework. However, the majority of these provisions have not yet come into effect. This has led to great critique on the South African trafficking response. It is strongly recommended that sections 15, 16 and 31(2)(b)(ii) of the act be gazetted into effect urgently. It is further suggested that the provisions of the Immigration Act as a whole and, more urgently, specifically in respect of immediate extradition of illegal foreigners be amended to make provision for cases where such foreigners are victims of trafficking.⁵¹¹ Should these provisions remain ineffective, South Africa will be in breach of its international obligation to protect and assist trafficking victims.

7.4. Adequate sanctions

A further point of criticism that has been levied against South Africa, is that the sentences imposed on trafficking offenders are too lenient. The sanctions implemented by South Africa in terms of the Trafficking Act can potentially be adequate as the prescribed minimum sentences are, in fact, heavy sanctions. However, courts have too often opted to graciously accept mitigating circumstances in justification of a less serious sentence such as a wholly suspended sentence.⁵¹² This deviation has been internationally criticised as the imposition of sentences that do not reflect the seriousness of the crime. Imposing sentences that do not reflect the seriousness of the crime constitute a breach of the Convention and, as such, the Palermo Protocol. The implementation of these sanctions must be considered. It is suggested that the prosecution refrain from crafting plea deals with accused that provide for non-imprisonment sentences, only. It is recommended that a policy document in respect of adequate sanctions in respect of trafficking offences be implemented as an objective standard and training guideline to assist in curbing the problem of the imposition of inappropriate sentences.

⁵¹¹ Mollema "Combating human trafficking in South Africa: A critical evaluation of the Prevention and Combating of Trafficking in Persons Act 7 of 2013 (2014) THRHR 262.

⁵¹² The United States Department of State 2018 Trafficking in Persons report <<https://www.state.gov/j/tip/rls/tiprpt/countries/2018/282748.htm>> (accessed 30 November 2018).

7.5. The required *mens rea* in terms of the Trafficking Act

The Palermo Protocol requires the criminalisation of intentional trafficking acts, but nonetheless affords member states the choice to institute a lower standard of *mens rea* as element of such state's domestic trafficking offence.⁵¹³ The Trafficking Act recognises a lesser standard of fault in respect of certain ancillary or trafficking-related crimes by importing a fault standard that mirrors that of the reasonable person test. The Trafficking Act requires a person, in certain circumstances, to act where such person "ought reasonably to have known or suspected" a fact.⁵¹⁴ As such, negligence would be sufficient form of fault in respect of these instances. In respect to other Trafficking Act offences, the act makes use of the words "knowingly" or "intentionally". In these cases, only intention would be sufficient to convict a perpetrator. However, in respect of the section 4(1) offence of trafficking in persons the Trafficking Act fails to make use of any of these explicit typical legislative indications regarding the required form of fault for this crime. Nonetheless, the use of the words "for the purpose of... exploitation" indicate that this conduct will be required to have been performed purposefully and, as such, and based on the ordinary meaning of the word, will require intentional action. The implication of this is that an exceptionally high standard of fault must be proven by the prosecution in order to secure a conviction of trafficking. When one considers that this fault element will have to be proven after the prohibited action and prohibit method have already been established, the evidentiary burden is immense. In this respect, it is suggested that a constitutionally-viable, rebuttable presumption of exploitative purpose be inserted in the legislation in respect of trafficking in persons as well as in respect of conduct facilitating such trafficking in persons. These presumptions would serve to lessen the evidentiary burden on prosecutors and, so doing, ensure South Africa can more adequately combat trafficking in persons without infringing the presumption of innocence.⁵¹⁵

This study further found that negligent trafficking can, in fact, occur. It further found that principles of reasonableness and public interest seriously require the criminalisation of negligent trafficking conduct. As such, it is suggested that negligence be imported as an acceptable standard of fault in respect of all offences created in terms of the Trafficking Act. This study concluded that conduct that facilitates the trafficking process would not be criminalised in all circumstances. Currently, the Trafficking Act only precludes certain conduct such as leasing or sub-leasing of premises for trafficking, advertising and other related acts that facilitate trafficking, financing, controlling or organising an offence in terms of Trafficking Act. It is, therefore, suggested that the Trafficking Act be amended to provide that all types of facilitative conduct or trafficking involvement, negligently and intentionally, be criminalised. This can be achieved by

⁵¹³ Article 5(1) of the Palermo Protocol as read with the Convention.

⁵¹⁴ Section 2(2) of the Trafficking Act.

⁵¹⁵ Refer to the discussion in 6.3.

adding a provision to section 8 of the Trafficking Act (which prohibits conduct facilitating trafficking) that criminalises:

“any conduct that facilitates trafficking in persons by a person who is aware or reasonably ought to have been aware or suspected that such conduct would facilitate the trafficking of another”

It is further suggested that the words “whether intentionally or negligently,” be added to section 10 of the Trafficking Act (which criminalises involvement in trafficking) so that it would read: *“an offence under this Chapter, whether intentionally or negligently, is guilty of an offence.”* As a result, the conduct prescribed in terms of this section would also be extended to include negligent conduct.

7.6. The existing statutory and common law framework

In strong agreement with Kruger and Oosthuizen, this study found that the existing common law and statutory legal framework is not fully sufficient to fulfil South Africa’s international obligations in respect of the trafficking phenomenon, but that it is a very useful and relevant part of South Africa’s response to this legal epidemic. Although promulgation and implementation of a domestic statute that comprehensively regulates trafficking in persons as it manifests within South Africa’s jurisdiction and across borders is critical, the existing legal structure should not be neglected in prosecuting this offence. It is recommended that the utilising of the existing common law as well as statutory offences form part of the natural approach in prosecuting trafficking as many of these offences will be present as fragments linked together in the complex trafficking process. Especially when it is considered that the onus of proof in trafficking cases could often entail proving more than one offence in proof of the prohibited actions or prohibited methods element. As such, the evidentiary burden is high. Therefore, it is suggested that the existing common law and statutory crimes that form these underlying elements or trafficking fragments be put to the accused as additional, where such charge would not lead to the duplication of charges, or as alternative charges. This will ensure that traffickers are met with the full force of the existing law.

The following further recommendations are made:

1. It is suggested that the Trafficking Act establish a National Register of Traffickers and that offenders convicted of trafficking in persons in terms of section 4(1), the section 4(2) offence, section 8 and section 10 offences be added to this register or, at minimum, where the trafficking was found to be for sexual exploitation or related to sexual conduct, to the National Register for Sexual Offenders.

2. The Domestic Violence Act provides police officers with right to arrest a suspect on reasonable grounds of suspecting violence against a complainant.⁵¹⁶ It is recommended that thought be given to affording police officials a similar right in respect of a suspicion of trafficking in persons in terms of the Trafficking Act to provide for the fact that trafficking victims' freedom of movement is generally restricted and such victims would generally not be able to speak out providing certain triggers for an automatic investigation.

7.7. Conclusion

The South African legal response to the trafficking predicament is extensive. It consists of the newly effected Trafficking Act, the full-fledged effect of which remains still to be seen, and the wide array of existing common law and statutory offences. Upon considering the implementation of this legal framework in combatting, prevention and suppression of trafficking conduct, both before the existence of the specific crime of trafficking in the South African law, as well as thereafter, the case law proves that it can be utilised to great effect. The approach of the court *a quo*, as supported by the Western Cape High Court upon appeal, in the *Jezile* case indicate that the combination of trafficking specific offences with existing offences is not only possible but can secure successful convictions and adequate sentences. Although, the *Jezile* case relates to charges in terms of the interim trafficking laws, this case further shows that the legal framework, albeit interim, is adequate to address trafficking as it manifests in the South African context. With the promulgation of the Trafficking Act by the South African legislature, the definition of the offence of trafficking in persons was broadened not only beyond the scope of what was considered trafficking under the interim legislation, but also, in respect of adult victims, beyond the scope of the international Palermo Protocol definition. As such, the section 4(1) trafficking in persons definition as implemented in the Trafficking Act meets the international obligation to criminalise trafficking. The further crimes prohibited by the Trafficking Act such as those prescribed in section 4(2) and sections 5 through 10, meets the further requirement to criminalise certain trafficking-related crimes as well as the obligation to implement "legislative or other measures" in combat and prevention of trafficking. The implementation of the new Trafficking Act naturally usurped the role of the interim trafficking provisions as set out in the Children's Act and Sexual Offences Amendment Act, repealing same upon coming into effect of the Trafficking Act. In compliance of the international obligation, the Trafficking Act requires the same three elements in order to constitute the trafficking in persons offence: the prohibited action, as achieved by the prohibited method and for the purposes of exploitation. These elements have been critically analysed and found to be compliant with the international criminalisation obligation. However, in respect of child victims of trafficking, the Trafficking Act fails to criminalise the required conduct. The Trafficking Act falls short of the international standard in that it fails to disregard the prohibited means element for victims younger than

⁵¹⁶ Section 3 of the Domestic Violence Act.

eighteen years. Consequently, the prohibited conduct when applied against the child victim is not as wide as required by the Palermo Protocol. This is a grave concern especially seen in the light that children and the protection of children's rights have been escalated as one of the main aims of the Palermo Protocol. In this regard, failing remedy, South Africa can be found to be non-compliant with the international rules. In respect of the brief consideration of the obligation to protect and assist victims, the Trafficking Act also exceeds its international duties. However, failing the coming into effect of sections 15, 16 and 31(2)(b)(ii), South Africa could be found in breach of the requirement to implement legislative measures in protection of foreign victims of trafficking. This study highlights certain further recommendations such as the inclusion of negligence as a sufficient form of fault and the creation of a presumption in respect of the required exploitative purpose of the trafficker. Although certain suggestions can be made to improve the form and implementation of the legislation, save for the definition of trafficking in respect of victims that are children, the Trafficking Act is found to be predominantly compliant with its international obligations and a legislative victory. What must necessarily now follow, is the successful implementation of this legislative framework in prevention, combat and suppression of trafficking. Following the promulgation of the Trafficking Act, South Africa climbed the ladder of the United States Trafficking report to the Tier 2 grading. Disappointingly, soon thereafter, the country was downgraded to the Tier 2 Watch List. This downgrading was not due to any fault within the legislation, but rather in the corruption of its implementation.⁵¹⁷ The prevention, combat and suppression of the complex and greatly bellicose phenomenon of trafficking in persons, cannot be achieved merely by the legislature itself. The implementation of comprehensive, combative anti-trafficking legislation fulfils one leg of the three-pronged international obligation. The effect of the Trafficking Act will be seen in its implementation in satisfying the further two obligations of victim protection and prevention of the trafficking prevalence. South Africa will have to roll up sleeves in combat of this enigmatic modern-day human rights violation. The recommendations made in this study seek to address the areas in which the Trafficking Act falls short of its international obligations. Ways are suggested to improve on aspects of practical implementation of South Africa's legislative as well as its further holistic anti-trafficking response. The suggestions made in respect of the effective prosecution in terms of the Trafficking Act and pre-existing legal framework strive to see that South Africa, again, be promoted from the Tier 2 Watch List and be found compliant in the holistic prevention, combat and suppression of trafficking in persons.

⁵¹⁷ Refer to paragraph 5.2.5 above for a set out of some of the reasons for the down-grading of South Africa to the Tier 2 Watch list.

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